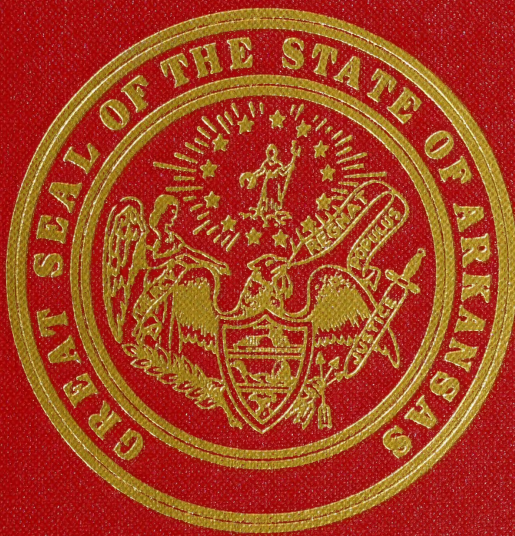



**ARKANSAS CODE
OF 1987
ANNOTATED**

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ARKANSAS CODE OF 1987 ANNOTATED



VOLUME 18 2015 Replacement TITLE 18: PROPERTY

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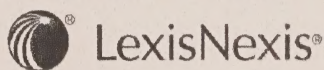
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Sources

This volume contains legislation enacted by the Arkansas General Assembly through the 2015 Regular Session and First Extraordinary Session. Annotations are to the following sources:

- Arkansas Supreme Court and Arkansas Court of Appeals Opinions
- Federal Supplement
- Federal Reporter
- United States Supreme Court Reports
- Bankruptcy Reporter
- Arkansas Law Notes
- Arkansas Law Review
- University of Arkansas at Little Rock Law Review
- American Law Reports (ALR)

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- | | |
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| 2. Agriculture | 17. Professions, Occupations, and
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| 4. Business and Commercial Law | 19. Public Finance |
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User's Guide

Differences in language, subsection order, punctuation, and other variations in the statute text from legislative acts, supplement pamphlets, and previous versions of the bound volume, are editorial changes made at the direction of the Arkansas Code Revision Commission pursuant to the authority granted in § 1-2-303.

Many of the Arkansas Code's research aids, as well as its organization and other features, are described in the User's Guide, which appears near the beginning of the bound Volume 1 of the Code.

TITLE 18

PROPERTY

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SUBTITLE 1. GENERAL PROVISIONS**CHAPTER 1****GENERAL PROVISIONS**

SECTION.

18-1-101. Lien holder form.

18-1-101. Lien holder form.

(a)(1) Any attachment, claim, encumbrance, financing statement, lien, mortgage, or security agreement filed of record against any real or personal property and any judgment filed of record against any person, firm, or corporation shall display the name, address, and telephone number of the claim holder, lien holder, or judgment creditor, together with the name and title of the person authorized to release the claim, lien, or judgment, or the person's successor.

(2) If an attachment, a claim, an encumbrance, a financing statement, a lien, a mortgage, a security agreement, or a judgment is filed on or after August 13, 2001, and does not comply with subdivision (a)(1) of this section, notice of an action commenced under § 18-50-101 et seq. shall be given by publication as provided in § 18-50-105.

(b) Subdivision (a)(2) of this section shall not be applicable to:

(1) Any claim holder, lien holder, or judgment creditor that is a financial institution insured by the Federal Deposit Insurance Corporation; or

(2) Motor vehicle titles.

(c) Clerks responsible for recording the documents enumerated in subsection (a) of this section shall ensure that the documents presented for filing display the information required by subsection (a) of this section.

(d) The validity or priority of any attachment, claim, encumbrance, financing statement, lien, mortgage, or security agreement currently on file, or filed of record after August 13, 2001, shall not be affected by the failure of any person to comply with the requirements of this section.

History. Acts 2001, No. 1125, § 1;
2007, No. 1411, § 1.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of assembly, Practice, Procedure, and Courts, Legislation, 2001 Arkansas General As- 24 U. Ark. Little Rock L. Rev. 523.

CHAPTER 2
COMMUTATION OF INTERESTS

SECTION.	SECTION.
18-2-101. Purpose.	18-2-104. Choice of interest.
18-2-102. Commutation of single life in- terest.	18-2-105. Table and example.
18-2-103. Choice of age.	18-2-106. Commutation of remainder in- terest.

<p>Publisher's Notes. Acts 1981, No. 350, § 8 provided in part that all interests in property commuted prior to July 1, 1981, would not in any manner be disturbed or reopened because of the passage of the act.</p>	<p>Effective Dates. Acts 1981, No. 350, § 8: effective as to all decrees ordering commutation issued on or after July 1, 1981.</p>
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18-2-101. Purpose.

- (a) The purpose of this subchapter is to establish a simple and accurate method for computing the present value of both vested life and remainder interests in property through the use of actuarial tables and to make the actuarial tables used in connection therewith current.
- (b) Nothing contained in this subchapter is intended:
- (1) To provide when a court shall order a life interest commuted and so payable in gross; or
 - (2) To change the existing jurisdiction of the courts under which such a decree requiring commutation may issue.

History. Acts 1981, No. 350, § 1; A.S.A. 1947, § 50-701.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Tyler, Survey of Business Law, 3 U. Ark. Little Rock L.J. 149.

18-2-102. Commutation of single life interest.

In any legal proceeding wherein the court shall decree that a vested right to future income for life from property is to be commuted and an amount payable in gross be substituted for the property right, then the value of the interest shall be computed by use of the table and in the

manner described in the example appearing in § 18-2-105 unless parties to the proceeding submit an agreement for a division of the proceeds which the court approves.

History. Acts 1981, No. 350, § 2; A.S.A. 1947, § 50-702.

CASE NOTES

Marital Deduction.

Where on payment to the widow of her commuted dower and homestead, the heirs at law became unconditionally entitled to the fee in their father's lands, the present cash value of the widow's com-

mutated life interest in real estate qualified for the marital deduction under 26 U.S.C. § 2056. *Mauldin v. United States*, 468 F. Supp. 422 (E.D. Ark. 1979) (decision under prior law).

18-2-103. Choice of age.

The appropriate age for use in the table is that of the person whose life expectancy serves to measure the life interest being valued.

History. Acts 1981, No. 350, § 3; A.S.A. 1947, § 50-703.

18-2-104. Choice of interest.

The court shall determine the interest rate to be used upon the basis of the prevailing interest rates obtainable for investments.

History. Acts 1981, No. 350, § 4; A.S.A. 1947, § 50-704.

18-2-105. Table and example.

(a) TABLE:

Age Years	Average Remaining Lifetime Years	Immediate Whole Life Annuity at Various Rates of Interest				
		4%	6%	8%	10%	12%
		Dollars	Dollars	Dollars	Dollars	Dollars
1	74.97	23.6260	16.4428	12.4579	9.9913	8.3314
2	75.37	23.6474	16.4480	12.4592	9.9917	8.3315
3	74.47	23.5988	16.4362	12.4562	9.9909	8.3313
4	73.54	23.5467	16.4234	12.4530	9.9901	8.3311
5	72.59	23.4916	16.4095	12.4494	9.9891	8.3308
6	71.63	23.4337	16.3947	12.4455	9.9881	8.3306
7	70.67	23.3736	16.3791	12.4413	9.9869	8.3302
8	69.70	23.3105	16.3623	12.4368	9.9857	8.3299
9	68.73	23.2450	16.3446	12.4319	9.9843	8.3295
10	67.75	23.1763	16.3257	12.4266	9.9827	8.3290

Age	Average Remaining Lifetime	Immediate Whole Life Annuity at Various Rates of Interest				
Years	Years	4% Dollars	6% Dollars	8% Dollars	10% Dollars	12% Dollars
11	66.77	23.1048	16.3057	12.4208	9.9811	8.3285
12	65.80	23.0313	16.2847	12.4147	9.9792	8.3279
13	64.82	22.9542	16.2623	12.4080	9.9772	8.3273
14	63.84	22.8740	16.2385	12.4008	9.9749	8.3266
15	62.87	22.7916	16.2136	12.3931	9.9725	8.3258
16	61.90	22.7059	16.1872	12.3848	9.9699	8.3249
17	60.94	22.6179	16.1597	12.3760	9.9670	8.3240
18	59.97	22.5255	16.1302	12.3664	9.9638	8.3229
19	59.02	22.4316	16.0996	12.3562	9.9603	8.3217
20	58.06	22.3330	16.0670	12.3452	9.9565	8.3204
21	57.10	22.2307	16.0325	12.3333	9.9524	8.3189
22	56.15	22.1256	15.9964	12.3207	9.9479	8.3172
23	55.19	22.0153	15.9579	12.3069	9.9429	8.3154
24	54.24	21.9020	15.9175	12.2923	9.9374	8.3134
25	53.29	21.7844	15.8749	12.2765	9.9315	8.3111
26	52.33	21.6610	15.8293	12.2594	9.9250	8.3085
27	51.38	21.5342	15.7817	12.2412	9.9178	8.3057
28	50.42	21.4012	15.7308	12.2213	9.9100	8.3025
29	49.47	21.2646	15.6775	12.2002	9.9014	8.2990
30	48.52	21.1228	15.6212	12.1774	9.8921	8.2951
31	47.57	20.9756	15.5617	12.1530	9.8819	8.2908
32	46.62	20.8229	15.4988	12.1266	9.8707	8.2860
33	45.68	20.6660	15.4330	12.0986	9.8586	8.2806
34	44.73	20.5015	15.3628	12.0682	9.8452	8.2747
35	43.79	20.3325	15.2894	12.0358	9.8306	8.2681
36	42.86	20.1591	15.2127	12.0014	9.8149	8.2608
37	41.92	19.9773	15.1309	11.9639	9.7976	8.2526
38	40.99	19.7907	15.0454	11.9242	9.7788	8.2437
39	40.07	19.5993	14.9561	11.8819	9.7586	8.2338
40	39.14	19.3987	14.8608	11.8361	9.7362	8.2228
41	38.23	19.1952	14.7625	11.7879	9.7123	8.2107
42	37.31	18.9819	14.6576	11.7356	9.6859	8.1973
43	36.41	18.7657	14.5494	11.6808	9.6578	8.1827
44	35.50	18.5391	14.4341	11.6214	9.6268	8.1663
45	34.60	18.3070	14.3139	11.5584	9.5934	8.1484
46	33.71	18.0693	14.1887	11.4916	9.5574	8.1287
47	32.83	17.8259	14.0583	11.4210	9.5186	8.1073
48	31.95	17.5739	13.9211	11.3454	9.4765	8.0836

Age	Average Remaining Lifetime	Immediate Whole Life Annuity at Various Rates of Interest				
Years	Years	4% Dollars	6% Dollars	8% Dollars	10% Dollars	12% Dollars
49	31.08	17.3162	13.7783	11.2654	9.4313	8.0577
50	30.21	17.0495	13.6281	11.1799	9.3821	8.0291
51	29.35	16.7767	13.4720	11.0896	9.3293	7.9980
52	28.49	16.4946	13.3078	10.9931	9.2720	7.9637
53	27.65	16.2097	13.1393	10.8924	9.2113	7.9267
54	26.80	15.9118	12.9602	10.7838	9.1448	7.8856
55	25.97	15.6110	12.7766	10.6706	9.0744	7.8415
56	25.14	15.3004	12.5838	10.5499	8.9982	7.7930
57	24.31	14.9794	12.3815	10.4212	8.9157	7.7397
58	23.49	14.6519	12.1718	10.2858	8.8276	7.6818
59	22.68	14.3179	11.9545	10.1434	8.7335	7.6192
60	21.88	13.9774	11.7297	9.9938	8.6332	7.5514
61	21.09	13.6305	11.4971	9.8367	8.5263	7.4782
62	20.30	13.2727	11.2536	9.6697	8.4110	7.3981
63	19.53	12.9132	11.0052	9.4969	8.2900	7.3128
64	18.76	12.5426	10.7454	9.3136	8.1598	7.2198
65	18.00	12.1657	10.4773	9.1216	8.0216	7.1196
66	17.25	11.7825	10.2008	8.9209	7.8750	7.0120
67	16.51	11.3933	9.9159	8.7111	7.7197	6.8964
68	15.78	10.9981	9.6225	8.4922	7.5554	6.7724
69	15.06	10.5971	9.3207	8.2638	7.3817	6.6397
70	14.35	10.1903	9.0104	8.0259	7.1984	6.4978
71	13.67	9.7901	8.7010	7.7856	7.0108	6.3508
72	13.01	9.3912	8.3887	7.5399	6.8167	6.1968
73	12.38	9.0007	8.0791	7.2935	6.6197	6.0387
74	11.77	8.6133	7.7684	7.0432	6.4174	5.8744
75	11.18	8.2297	7.4572	6.7897	6.2101	5.7044
76	10.61	7.8506	7.1462	6.5337	5.9986	5.5290
77	10.04	7.4629	6.8247	6.2661	5.7752	5.3418
78	9.48	7.0734	6.4982	5.9916	5.5435	5.1458
79	8.93	6.6825	6.1671	5.7102	5.3037	4.9408
80	8.40	6.2978	5.8377	5.4275	5.0604	4.7308
81	7.90	5.9274	5.5176	5.1500	4.8193	4.5208
82	7.42	5.5649	5.2014	4.8734	4.5768	4.3077
83	6.98	5.2266	4.9036	4.6107	4.3445	4.1018
84	6.57	4.9061	4.6192	4.3578	4.1191	3.9006
85	6.17	4.5884	4.3351	4.1033	3.8906	3.6950
86	5.80	4.2900	4.0664	3.8608	3.6713	3.4964

Age	Average Remaining Lifetime	Immediate Whole Life Annuity at Various Rates of Interest				
		4%	6%	8%	10%	12%
Years	Years	Dollars	Dollars	Dollars	Dollars	Dollars
87	5.43	3.9873	3.7918	3.6112	3.4441	3.2892
88	5.09	3.7052	3.5342	3.3755	3.2282	3.0911
89	4.77	3.4362	3.2870	3.1480	3.0185	2.8975
90	4.47	3.1810	3.0510	2.9296	2.8160	2.7095
91	4.18	2.9314	2.8190	2.7136	2.6146	2.5216
92	3.92	2.7052	2.6076	2.5158	2.4293	2.3478
93	3.69	2.5032	2.4179	2.3375	2.2616	2.1897
94	3.50	2.3350	2.2593	2.1878	2.1201	2.0560
95	3.33	2.1833	2.1159	2.0520	1.9914	1.9339
96	3.18	2.0487	1.9882	1.9307	1.8761	1.8242
97	3.06	1.9404	1.8852	1.8326	1.7827	1.7351
98	2.95	1.8407	1.7901	1.7419	1.6961	1.6523
99	2.85	1.7497	1.7032	1.6588	1.6165	1.5752
100	2.77	1.6766	1.6333	1.5919	1.5524	1.5146

(b) EXAMPLE: Joe Doe is entitled to receive the income from a principal sum of ten thousand dollars (\$10,000) during the life of one Martha Jones, fifty-five (55) years of age. There is a remainder estate in favor of Timothy Doe. In an appropriate proceeding a court in Arkansas has determined that the life tenant is to be paid a lump sum in commutation of his right to income for the life of Martha Jones; the court has further determined that four percent (4%) is the rate of interest obtainable on an investment of a sum of the size of the principal sum. In the table, follow the left-hand column, which is labeled "age", down vertically until fifty-five (55) is reached; then move horizontally until the column headed "4%" is intersected. At the intersection is found the figure: 15.6110. This figure is to be multiplied by the yearly income, which is found by multiplying the principal sum by the appropriate rate of interest. In this case that would be ten thousand dollars (\$10,000) multiplied by .04 equalling four hundred dollars (\$400). Then 15.6110 multiplied by four hundred dollars (\$400) equals six thousand two hundred forty-four dollars and forty cents (\$6,244.40). This is the sum which the court would direct to be paid to Joe Doe in commutation of his income right. Timothy Doe would be paid three thousand seven hundred fifty-five dollars and sixty cents (\$3,755.60). See § 18-2-106: principal sum ten thousand dollars (\$10,000) *minus* commuted life interest six thousand two hundred forty-four dollars and forty cents (\$6,244.40) equals commuted remainder three thousand seven hundred fifty-five dollars and sixty cents (\$3,755.60).

History. Acts 1981, No. 350, § 5; A.S.A. 1947, § 50-705.

CASE NOTES

ANALYSIS

Expert Witnesses.
Life Expectancy.

Expert Witnesses.

Where the court's finding was in accordance with former section regarding life expectancy tables and was the result which the court clearly intended, the fact that the court mistakenly regarded expert witness as in agreement with former section did not require reversal of a judgment entered in favor of the decedent's heirs. *Martin v. United States*, 586 F.2d 1206 (8th Cir. 1978) (decision under prior law).

Life Expectancy.

According to the actuarial tables in this section, the wife had an average remain-

ing life expectancy of approximately 26 years, but it would take over 26 years for the husband to pay the wife the amount she was due, and it was unclear whether the parties would live long enough for the wife to receive all of her share of the marital property; if the circuit court was attempting to have the husband pay the wife for her share, it should have stood by its order to have the husband provide some form of security such as a life insurance policy with the wife as the beneficiary, or a bond. *Farrell v. Farrell*, 2014 Ark. App. 601 (2014).

Cited: *Bill Davis Trucking, Inc. v. Prysock*, 301 Ark. 387, 784 S.W.2d 755 (1990).

18-2-106. Commutation of remainder interest.

The present value of a remainder interest is found by subtracting from the principal sum the value of the commuted life interest as determined by this subchapter.

History. Acts 1981, No. 350, § 6; A.S.A. 1947, § 50-706.

CHAPTER 3

UNIFORM STATUTORY RULE AGAINST PERPETUITIES

SECTION.

- 18-3-101. Statutory rule against perpetuities.
- 18-3-102. When nonvested property interest or power of appointment created.
- 18-3-103. Reformation.
- 18-3-104. Exclusions from statutory rule against perpetuities.

SECTION.

- 18-3-105. Prospective application.
- 18-3-106. Short title.
- 18-3-107. Uniformity of application and construction.
- 18-3-108. [Reserved.]
- 18-3-109. Supersession of common law.

Effective Dates. Acts 2007, No. 240, § 5: Mar. 9, 2007. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the current extremely harsh remedy under the rule against perpetuities

that renders a grantor's entire grant void if the grant violates the rule is outdated and should be replaced; that the common law rule fosters litigation at great cost to the citizens of this state because of its many complexities, with often devastat-

ing consequences to estates; and that the revision by this act of the common law remedy to permit the likely occurrence that a grant will vest or to permit a court to reform a grant that does not vest in the manner that most likely approximate the transferor's manifested plan is immediately necessary for the good of the citizens of this state. Therefore, an emergency is declared to exist and this act being imme-

diately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

18-3-101. Statutory rule against perpetuities.

(a) A nonvested property interest is invalid unless:

(1) when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or

(2) the interest either vests or terminates within 90 years after its creation.

(b) A general power of appointment not presently exercisable because of a condition precedent is invalid unless:

(1) when the power is created, the condition precedent is certain to be satisfied or becomes impossible to satisfy no later than 21 years after the death of an individual then alive; or

(2) the condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

(c) A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:

(1) when the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or

(2) the power is irrevocably exercised or otherwise terminates within 90 years after its creation.

(d) In determining whether a nonvested property interest or a power of appointment is valid under subdivision (a)(1), (b)(1), or (c)(1) of this section, the possibility that a child will be born to an individual after the individual's death is disregarded.

(e) If, in measuring a period from the creation of a trust or other property arrangement, language in a governing instrument (i) seeks to disallow the vesting or termination of any interest or trust beyond, (ii) seeks to postpone the vesting or termination of any interest or trust until, or (iii) seeks to operate in effect in any similar fashion upon, the later of (A) the expiration of a period of time not exceeding 21 years after the death of the survivor of specified lives in being at the creation of the trust or other property arrangement or (B) the expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement, that language is inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives.

History. Acts 2007, No. 240, § 1.

RESEARCH REFERENCES

ALR. Lease Renewal Provision as Violating Rule Against Perpetuities or Restraints on Alienation. 99 A.L.R.6th 591 (2014).

U. Ark. Little Rock L. Rev. Fifty-one Flowers: Post-Perpetuities War Law and Arkansas's Adoption of USRAP, 29 U. Ark. Little Rock L. Rev. 411.

18-3-102. When nonvested property interest or power of appointment created.

(a) Except as provided in subsections (b) and (c) of this section and in § 18-3-105(a), the time of creation of a nonvested property interest or a power of appointment is determined under general principles of property law.

(b) For purposes of this chapter, if there is a person who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of (i) a nonvested property interest or (ii) a property interest subject to a power of appointment described in § 18-3-101(b) or § 18-3-101(c), the nonvested property interest or power of appointment is created when the power to become the unqualified beneficial owner terminates.

(c) For purposes of this chapter, a nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust or other existing property arrangement is created when the nonvested property interest or power of appointment in the original contribution was created.

History. Acts 2007, No. 240, § 1.

18-3-103. Reformation.

Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed by § 18-3-101(a)(2), § 18-3-101(b)(2), or § 18-3-101(c)(2) if:

(1) a nonvested property interest or a power of appointment becomes invalid under § 18-3-101;

(2) a class gift is not but might become invalid under § 18-3-101 and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or

(3) a nonvested property interest that is not validated by § 18-3-101(a)(1) can vest but not within 90 years after its creation.

History. Acts 2007, No. 240, § 1.

18-3-104. Exclusions from statutory rule against perpetuities.

Section 18-3-101 does not apply to:

(1) a nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of (i) a premarital or postmarital agreement, (ii) a separation or divorce settlement, (iii) a spouse's election, (iv) a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties, (v) a contract to make or not to revoke a will or trust, (vi) a contract to exercise or not to exercise a power of appointment, (vii) a transfer in satisfaction of a duty of support, or (viii) a reciprocal transfer;

(2) a fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property, and the power of a fiduciary to determine principal and income;

(3) a power to appoint a fiduciary;

(4) a discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal;

(5) a nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision;

(6) a nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral, or other current or deferred benefit plan for one or more employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income, or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse; or

(7) a property interest, power of appointment, or arrangement that was not subject to the common-law rule against perpetuities or is excluded by another statute of this State.

History. Acts 2007, No. 240, § 1.

18-3-105. Prospective application.

(a) Except as extended by subsection (b) of this section, this chapter applies to a nonvested property interest or a power of appointment that is created on or after March 9, 2007. For purposes of this section, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

(b) If a nonvested property interest or a power of appointment was created before March 9, 2007, and is determined in a judicial proceeding, commenced on or after March 9, 2007, to violate this State's rule against perpetuities as that rule existed before March 9, 2007, a court upon the petition of an interested person may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.

History. Acts 2007, No. 240, § 1.

18-3-106. Short title.

This chapter may be cited as the Uniform Statutory Rule Against Perpetuities.

History. Acts 2007, No. 240, § 1.

18-3-107. Uniformity of application and construction.

This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

History. Acts 2007, No. 240, § 1.

18-3-108. [Reserved.]

18-3-109. Supereession of common law.

This chapter supersedes the rule of the common law known as the rule against perpetuities.

History. Acts 2007, No. 240, § 1.

CHAPTER 4

MISCELLANEOUS OWNERSHIP RIGHTS

SUBCHAPTER.

1. GENERAL PROVISIONS. [RESERVED.]
2. ARKANSAS SLAYER LAW.

SUBCHAPTER 1 — GENERAL PROVISIONS [RESERVED]

SUBCHAPTER 2 — ARKANSAS SLAYER LAW

SECTION.

- 18-4-201. Title.
18-4-202. Definitions.
18-4-203. Tolling of civil actions.

SECTION.

- 18-4-204. Slayer barred from testate or
intestate succession and
other rights.

SECTION.

18-4-205. Insurance and annuity benefits.

18-4-206. Persons acquiring property from slayer protected.

SECTION.

18-4-207. Remedies supplemental.

18-4-208. Effect on existing proceedings.

18-4-201. Title.

This subchapter shall be known and may be cited as the “Arkansas Slayer Law”.

History. Acts 2013, No. 1351, § 1.

18-4-202. Definitions.

As used in this chapter:

(1) “Decedent” means a person whose life is taken by a slayer;

(2) “Property” means real or personal property; and

(3) “Slayer” means an individual who is:

(A) Convicted by a court of competent jurisdiction of or pleads guilty or nolo contendere to the unlawful killing of the decedent;

(B) Found by a preponderance of the evidence in a civil action to have unlawfully killed the decedent or procured the killing of the decedent, including an individual who has been:

(i) Acquitted by reason of insanity, mental defect or disease, or any other mental incapacity concerning a criminal charge of the unlawful killing of the decedent; or

(ii) Found to lack the capacity to understand or effectively assist in a criminal proceeding against himself or herself for the unlawful killing of the decedent; or

(C) A juvenile who is adjudicated delinquent by reason of committing an act that if committed by an adult would constitute the unlawful killing of the decedent.

History. Acts 2013, No. 1351, § 1.

18-4-203. Tolling of civil actions.

If a criminal proceeding is brought against a person to establish the person’s guilt concerning the unlawful killing of the decedent, a civil action that involves an issue of whether the person unlawfully killed the decedent may be brought within one (1) year after a final determination is made in the criminal proceeding, including a determination concerning the person’s:

(1) Mental capacity under § 5-2-312 or § 5-2-313 or similar provisions of another state’s law; or

(2) Fitness to proceed under § 5-2-309 or a similar provision of another state’s law.

History. Acts 2013, No. 1351, § 1.

18-4-204. Slayer barred from testate or intestate succession and other rights.

(a) A slayer is deemed to have died immediately before the death of the decedent.

(b) A slayer shall not acquire any property or property right or receive any benefit from the estate of the decedent by testate or intestate succession, by common law, or by statutory right, including as the surviving spouse of the decedent.

History. Acts 2013, No. 1351, § 1.

18-4-205. Insurance and annuity benefits.

(a) Insurance and annuity proceeds payable to a slayer as the beneficiary or assignee of a policy or certificate of insurance or an annuity contract on the life of the decedent, or in any other manner payable to the slayer by virtue of the slayer having survived the decedent, shall be paid to the decedent's estate.

(b) If the decedent is the beneficiary or assignee of any annuity contract, life insurance policy, or certificate of insurance on the life of the slayer, the proceeds shall be paid to the estate of the decedent upon the death of the slayer.

(c) An insurance or annuity company that makes payment according to the terms of the annuity contract, life insurance policy, or certificate of insurance is not liable under this subchapter if payment or performance is made without knowledge of circumstances tending to make this subchapter apply.

History. Acts 2013, No. 1351, § 1.

18-4-206. Persons acquiring property from slayer protected.

The provisions of this subchapter do not affect the right of a person who before the interests of the slayer have been adjudicated acquires from the slayer for adequate consideration property that the slayer would have received except for the terms of this subchapter if the person acquired the property without notice of circumstances tending to make this subchapter apply provided, however, that:

(1) The consideration received by the slayer shall be held by the slayer in trust for the persons entitled to the property under this subchapter; and

(2) The slayer is liable for:

(A) Any portion of the consideration which the slayer may have transferred or dissipated; and

(B) Any difference between the actual value of the property and the amount of the consideration paid for the property.

History. Acts 2013, No. 1351, § 1.

18-4-207. Remedies supplemental.

This subchapter supplements:

- (1) The common law of the State of Arkansas as it exists on August 16, 2013, unless application of the common law would be inconsistent with this subchapter; and
- (2) Section 28-11-204.

History. Acts 2013, No. 1351, § 1.

18-4-208. Effect on existing proceedings.

This subchapter applies to a civil or criminal action that is pending at the time of August 16, 2013, in which a final, nonappealable judgment has not been entered.

History. Acts 2013, No. 1351, § 1.

CHAPTERS 5-9

[Reserved]

SUBTITLE 2. REAL PROPERTY

CHAPTER 10

GENERAL PROVISIONS

[Reserved]

CHAPTER 11

REAL PROPERTY INTERESTS GENERALLY

SUBCHAPTER.

- 1. OWNERSHIP AND POSSESSION.
- 2. PROPERTY OF RELIGIOUS SOCIETIES.
- 3. RECREATIONAL USES — OWNER’S LIABILITY.
- 4. POSTED LAND.
- 5. RESIDENTIAL RESTRICTIVE COVENANTS.
- 6. MUNICIPAL WATER SUPPLY PURPOSES — OWNER’S IMMUNITY.

SUBCHAPTER 1 — OWNERSHIP AND POSSESSION

SECTION.

- 18-11-101. Capacity of aliens to take and transfer lands.
- 18-11-102. Payment of taxes on unimproved or unenclosed land deemed possession.

SECTION.

- 18-11-103. Payment of taxes on wild and unimproved land — Presumption of color of title.
- 18-11-104. Right of possession not impaired by descent cast.

SECTION.

18-11-105. Surface rights of cotenants or tenants-in-common —
Waiver.

SECTION.

18-11-106. Adverse possession.

Effective Dates. Acts 1874, No. 16,
§ 3: effective on passage.

RESEARCH REFERENCES

ALR. State regulation of land ownership by alien corporation. 21 A.L.R.4th 1329.
Identification of land, presumptions and evidence respecting land on which property taxes were paid to establish ad-

verse possession. 36 A.L.R.4th 843.
Gathering of natural crop, or cutting of timber by record owner as defeating exclusiveness or continuity of possession by one claiming title by adverse possession. 39 A.L.R.4th 1148.

18-11-101. Capacity of aliens to take and transfer lands.

- (a) All aliens shall be capable of taking, by deed or will, lands and tenements in fee simple, or other less estate, and of holding, aliening, and devising them.
- (b) Upon the death of any alien having title by purchase or descent, according to this section, to any lands or tenements, the lands and tenements shall descend and pass as if the alien were a citizen of the United States.
- (c) It shall be no objection to the husband, widow, or kindred of an alien, or any citizen deceased, taking lands and tenements by virtue of the laws of this state regulating the distribution of estates of intestates, that they are aliens.

History. Rev. Stat., ch. 7, § 1; Acts 1874, No. 16, § 1, p. 60; C. & M. Dig., § 258; Pope's Dig., § 272; A.S.A. 1947, § 50-301.
Cross References. Possession, enjoy-

ment, or descent of property, prohibition against distinction by law between resident aliens and citizens, Ark. Const., Art. 2, § 20.

RESEARCH REFERENCES

Ark. L. Rev. The New Arkansas Inheritance Laws: A Step into the Present with an Eye to the Future, 23 Ark. L. Rev. 313.

CASE NOTES

ANALYSIS
In General.
Dower.
Homestead Exemption.
Title by Prescription.

In General.

Under this section aliens may take and transmit land by inheritance or otherwise, and they could at common law take by purchase which includes every other mode of acquiring property as distinguished from descent, and includes acquisition by devise. *Jones v. Minogue*, 29 Ark. 637 (1874).

Dower.

The widow of an alien may take dower. *Hill's Adm'rs v. Mitchell*, 5 Ark. (5 Pike) 608 (1844).

Homestead Exemption.

An alien domiciled in this state, being a householder, is entitled to the exemption of his homestead from sale on execution. *McKenzie v. Murphy*, 24 Ark. 155 (1865).

Title by Prescription.

Aliens may acquire land by virtue of the statute of limitations. *Price v. Greer*, 89 Ark. 300, 116 S.W. 676, 118 S.W. 1009 (1909).

18-11-102. Payment of taxes on unimproved or unenclosed land deemed possession.

Unimproved and unenclosed land shall be deemed and held to be in possession of the person who pays the taxes thereon if he or she has color of title thereto, but no person shall be entitled to invoke the benefit of this section unless he or she, and those under whom he or she claims, shall have paid the taxes for at least seven (7) years in succession.

History. Acts 1899, No. 66, § 1, p. 117; C. & M. Dig., § 6943; Pope's Dig., § 8920; A.S.A. 1947, § 37-102.

RESEARCH REFERENCES

Ark. L. Rev. Tax Forfeiture Problems in the Examination of Abstracts, 12 Ark. L. Rev. 333.

Color of Title and Payment of Taxes: The New Requirements Under Arkansas Adverse Possession Law, 50 Ark. L. Rev. 489.

U. Ark. Little Rock L.J. Notes, Property — Notice to Mortgagees in Tax Sales, 7 U. Ark. Little Rock L.J. 437.

U. Ark. Little Rock L. Rev. Annual Survey of Caselaw, Property Law, 25 U. Ark. Little Rock L. Rev. 1025.

Lynn Foster & J. Cliff McKinney, II, Adverse Possession and Boundary by Acquiescence in Arkansas: Some Suggestions for Reform, 33 U. Ark. Little Rock L. Rev. 199 (2011).

CASE NOTES

ANALYSIS

Constitutionality.
Construction.
Purpose.
Applicability.
Acquisition of Title.
Actual Adverse Possession.
Color of Title.
—Tax Sales.
Description of Property.

Evidence.
Foreign Corporations.
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Military Personnel.
Mineral Rights.
Nature of Land.
Payment.
Possession.
Running of Statutory Period.
—Actions by Original Owner.
—Persons Under Disabilities.

Constitutionality.

The statute is valid. *Cottonwood Lumber Co. v. Hardin*, 78 Ark. 95, 92 S.W. 1118 (1906), *aff'd*, 207 U.S. 580, 28 S. Ct. 258, 52 L. Ed. 350 (1907).

Construction.

This section must be construed in connection with the saving clause in § 18-61-101. *Taylor v. Leonard*, 94 Ark. 122, 126 S.W. 387 (1910); *Deane v. Moore*, 105 Ark. 309, 151 S.W. 286 (1912); *Brasher v. Taylor*, 109 Ark. 281, 159 S.W. 1120 (1913).

This section, when coupled with § 18-61-101, works to invest title in one who has paid taxes on wild and unenclosed lands for a period in excess of seven years. *Broadhead v. McEntire*, 19 Ark. App. 259, 720 S.W.2d 313 (1986).

Purpose.

The purpose of this section was to encourage the payment of taxes and to protect persons who pay them. *Schmeltzer v. Scheid*, 203 Ark. 274, 157 S.W.2d 193 (1941).

Purpose of legislature was to encourage payment of taxes, hence rights under the section are not restricted to sales made by tax collection authorities. *Buckner v. Sewell*, 216 Ark. 221, 225 S.W.2d 525 (1949).

Applicability.

Where owner of land conveyed a timber deed to timber owner who recorded his deed and the same owner conveyed a warranty deed to landowner for same parcel who then recorded her deed, the landowner could not adversely possess the timber estate merely by paying taxes on unimproved land for approximately 20 years and this section was inapplicable. *Bonds v. Carter*, 348 Ark. 591, 75 S.W.3d 192 (2002).

Acquisition of Title.

Payment of taxes on wild, unimproved land, under color of title, for the statutory period confers title by limitations. *Towson v. Denson*, 74 Ark. 302, 86 S.W. 661 (1905); *Paragould Abstract & Real Estate Co. v. Coffman*, 100 Ark. 582, 140 S.W. 730 (1911); *Reynolds v. Snyder*, 121 Ark. 33, 180 S.W. 752 (1915); *Buckner v. Sewell*, 216 Ark. 221, 225 S.W.2d 525 (1949); *Beshea v. Vlazny*, 228 Ark. 559, 309 S.W.2d 28 (1958); *Greif Bros. Cooperage Corp. v. United States Gypsum Co.*, 341 F.2d 167 (8th Cir. 1965).

Payment of taxes held to have vested title in taxpayer. *Paragould Abstract & Real Estate Co. v. Coffman*, 100 Ark. 582, 140 S.W. 730 (1911); *McFarlane v. Morgan*, 157 Ark. 97, 248 S.W. 257 (1923); *Bryant v. Chicago Mill & Lumber Co.*, 120 F. Supp. 463 (E.D. Ark.), *aff'd*, 216 F.2d 727 (8th Cir. 1954); *Laney v. Monsanto Chem. Co.*, 233 Ark. 645, 348 S.W.2d 826 (1961); *Clark v. Dillard*, 233 Ark. 760, 346 S.W.2d 684 (1961); *Dierks Forests, Inc. v. Garrett*, 242 Ark. 223, 412 S.W.2d 849 (1967).

Payment of taxes on portion of tract vested taxpayer with the title to the portion of the tract on which he paid taxes for the statutory period. *Wells v. Rock Island Imp. Co.*, 110 Ark. 534, 162 S.W. 572 (1913).

Payment of taxes on wild lands for a portion of the seven-year period may be joined to actual adverse possession for the remainder of the period so as to give title by limitation. *Miller v. Chicago Mill & Lumber Co.*, 140 Ark. 639, 215 S.W. 900 (1919).

To acquire title to land by the payment of taxes for seven years, the land must be subject to taxation during all that period. *Kelley Trust Co. v. Lundell Land & Lumber Co.*, 159 Ark. 218, 251 S.W. 680 (1923).

Both this section and § 18-11-103 contemplate that another person has the original paper title. *Schmeltzer v. Scheid*, 203 Ark. 274, 157 S.W.2d 193 (1941).

In suit to quiet title where deed to one party was shown to be a forgery and other party under color of title had paid taxes on the land admitted to be wild and unimproved, party holding forged deed had no title to be quieted and judgment in favor of party which had paid the taxes was affirmed. *Coulter v. Clemons*, 237 Ark. 227, 372 S.W.2d 396 (1963).

The purchaser of the land was not entitled to have his title confirmed by actual physical possession of the property for more than seven years, where there was evidence that he had only been on the property four or five times during the seven-year period and his other acts of possession were merely fitful, and it was stipulated by the parties that the property was wild and unimproved and not occupied by anyone. *Broadhead v. McEntire*, 19 Ark. App. 259, 720 S.W.2d 313 (1986).

Actual Adverse Possession.

This section does not require the party claiming adverse possession under this section to show actual adverse possession. *Jones v. Barger*, 67 Ark. App. 337, 1 S.W.3d 31 (1999).

Color of Title.

A contract for the purchase of land does not constitute color of title. *Willm v. Dedman*, 172 Ark. 783, 290 S.W. 361 (1927).

A trustee's deed whether valid, void, or voidable, is color of title, unless facts in avoidance appear on face of deed. *Buckner v. Sewell*, 216 Ark. 221, 225 S.W.2d 525 (1949).

A void deed from the State Land Commissioner constitutes color of title so that grantee thereon who paid taxes on unimproved, unenclosed land for seven consecutive years acquired valid title by adverse possession. *Fuller v. Terrill*, 226 Ark. 1040, 295 S.W.2d 625 (1956).

A redemption of tax-forfeited land does not in itself constitute color of title. *Rinke v. Weedman*, 232 Ark. 900, 341 S.W.2d 44 (1960).

Color of title is not created by a deed from a man to himself and his wife made for the express purpose of creating color of title. *Weast v. Hereinafter Described Lands*, 33 Ark. App. 157, 803 S.W.2d 565 (1991).

Judgment ruling that appellant did not own any property on the northeast bank of the river where it flowed by appellees' lots and finding that appellant failed to establish adverse possession was affirmed; appellant's payment of taxes was irrelevant because appellant did not have color of title to the land in dispute. *Rio Vista, Inc. v. Miles*, 2010 Ark. App. 190, 374 S.W.3d 698 (2010).

—Tax Sales.

A certificate of purchase at tax sale is not color of title. *Townsend v. Penrose*, 84 Ark. 316, 105 S.W. 588 (1907); *Thorne v. Magness*, 34 Ark. App. 39, 805 S.W.2d 95 (1991).

Tax sale deed from the state constituted color of title so as to give good title to the land by adverse possession under color of title. *Pinkert v. Williamson*, 225 Ark. 834, 287 S.W.2d 8 (1956); *Rinke v. Weedman*, 232 Ark. 900, 341 S.W.2d 44 (1960); *Clark v. Dillard*, 233 Ark. 760, 346 S.W.2d 684 (1961).

A tax deed containing an indefinite description does not constitute color of title. *Darr v. Lambert*, 228 Ark. 16, 305 S.W.2d 333 (1957).

Tax deed void because tax sale was void nevertheless constituted color of title. *Rinke v. Weedman*, 232 Ark. 900, 341 S.W.2d 44 (1960).

Tax deed containing invalid description of property did not constitute color of title so as to give party constructive possession by the payment of taxes which would ripen into ownership in seven years. *Glover v. Walter*, 252 Ark. 1293, 483 S.W.2d 713 (1972).

Description of Property.

Title could not be acquired under this section when the claimant's deed was void for indefiniteness of description of the lands conveyed. *Charles v. Pierce*, 238 Ark. 22, 378 S.W.2d 213 (1964).

Where description on tax records was valid, taxpayer's claim ripened into good title under this section even though description in deed was defective. *Dierks Forests, Inc. v. Garrett*, 242 Ark. 223, 412 S.W.2d 849 (1967).

Title under this section was not established where records of tax payment contained descriptions too indefinite to identify the land upon which taxes were paid. *Corn v. Arkansas Whse. Corp.*, 243 Ark. 130, 419 S.W.2d 316 (1967).

Where description of land on which taxes are paid is indefinite and does not serve to fix geographic location, this section does not apply. *Greif Bros. Cooperage Corp. v. United States Gypsum Co.*, 341 F.2d 167 (8th Cir. 1965).

Evidence.

The appellants were entitled to have the chancery court quiet title to certain property where (1) the parties agreed that the property was wild and unimproved, (2) the appellants had color of title pursuant to a warranty deed, notwithstanding that the appellee claimed that his chain of title was superior, and (3) the appellants and their predecessors paid taxes on the property for over 30 years. *Jones v. Barger*, 67 Ark. App. 337, 1 S.W.3d 31 (1999).

Foreign Corporations.

A foreign corporation with no agent in the state is entitled to the benefit of this

section. *Rachels v. Stecher Cooperage Works*, 95 Ark. 6, 128 S.W. 348 (1910).

Method of Taxation.

The assessment and taxation by sections or sectional quarters and accretions is good and sufficient to bring into operation this section absent a severance of the accretions or relictions by platting and extending the sectional, township, and range lines. *United States Gypsum Co. v. Greif Bros. Cooperage Corp.*, 389 F.2d 252 (8th Cir. 1968).

Military Personnel.

Where soldier's right to redeem from tax sale was saved by the federal Soldiers' and Sailors' Civil Relief Act of 1940, that right could not be defeated by possession and payment of taxes. *Hedrick v. Bigby*, 228 Ark. 40, 305 S.W.2d 674 (1957).

Mineral Rights.

Owner of the surface did not acquire title to the severed mineral estate in wild and unimproved lands by the payment of taxes for seven successive years. *Claybrooke v. Barnes*, 180 Ark. 678, 22 S.W.2d 390 (1929).

It is a primary requirement that the adverse claimant pay taxes on the claimed property for full seven years; consequently, where there was failure to pay on a severed mineral interest (although payments were made on the land and unsevered portion of the minerals), the dominant estate claimant did not acquire title. *Jones v. Brown*, 211 Ark. 164, 199 S.W.2d 973 (1947).

Payment of taxes on wild and unimproved land did not cover minerals since minerals within the earth are not susceptible of enclosure. *Brizzolara v. Powell*, 214 Ark. 870, 218 S.W.2d 728 (1949).

Possession of surface of wild and unimproved land is not adverse to owner of constructively severed minerals in land. Consequently, payment of general taxes by grantees of wild and unimproved land and of minerals therein did not, as against their grantor, to whom they subsequently reconveyed severed minerals, constitute adverse possession of such minerals. *Buckner v. Wright*, 218 Ark. 448, 236 S.W.2d 720 (1951).

Where mineral interest was severed prior to the time that payments commenced, tax payments would not be deemed to cover such severed mineral

interest. *Laney v. Monsanto Chem. Co.*, 233 Ark. 645, 348 S.W.2d 826 (1961); *Burbridge v. Rosen*, 240 Ark. 500, 400 S.W.2d 502 (1966).

Where holders of color of title to mineral interests are not in a position of hostility toward one another, each claimant can reap the benefit of tax payments made by any one of the others. *Burbridge v. Rosen*, 240 Ark. 500, 400 S.W.2d 502 (1966).

Where defendant obtained tax deed to mineral interest and paid taxes subsequent thereto, she did not gain color of title to the mineral interest since she never took actual possession of the minerals by opening and operating mines as required to claim adverse possession of mineral rights. *Garvan v. Potlatch Corp.*, 278 Ark. 414, 645 S.W.2d 957 (1983). See also *Gilbreath v. Union Bank*, 309 Ark. 360, 830 S.W.2d 854 (1992).

Two estates, when once separated, remain independent, and title to the mineral rights can never be acquired by merely holding and claiming the land, even though the landowner also asserts title in the minerals at the same time; the only way the statute of limitation can be asserted against the owner of the mineral rights or estate is for the owner of the surface estate or some other person to take actual possession of the minerals by opening mines and operating the same for the statutory period. *Bonds v. Carter*, 348 Ark. 591, 75 S.W.3d 192 (2002).

Nature of Land.

This section does not apply to lands fenced or in cultivation. *Wheeler v. Foote*, 80 Ark. 435, 97 S.W. 447 (1906); *Fenton v. Collum*, 104 Ark. 624, 150 S.W. 140 (1912); *Davis v. Grobmyer*, 132 Ark. 11, 199 S.W. 917 (1917); *Dill v. Snodgrass*, 213 Ark. 526, 211 S.W.2d 440 (1948); *Phillips v. Michel*, 217 Ark. 865, 233 S.W.2d 551 (1950).

Title by adverse possession of wild and unoccupied land is not acquired by payment of taxes for seven consecutive years where the land is not unoccupied during the entire statutory period. *Alphin v. Blackmon*, 180 Ark. 260, 21 S.W.2d 426 (1929).

Payment of taxes on land not "unimproved and unenclosed" does not constitute constructive possession thereof within the meaning of this section. *Etchison v. Dail*, 182 Ark. 350, 31 S.W.2d 426 (1930).

The words "unimproved" and "unenclosed" and the word "wild" have been used interchangeably and both this section and § 18-11-103 apply to urban as well as rural unoccupied, wild, or unenclosed land. *Schmeltzer v. Scheid*, 203 Ark. 274, 157 S.W.2d 193 (1941).

The land paid on must be wild, unoccupied, unenclosed and unimproved during all the time the payments are being made. *Schmeltzer v. Scheid*, 203 Ark. 274, 157 S.W.2d 193 (1941).

Title to land not acquired by payment of taxes where land was not unenclosed and unimproved. *Sturgis v. Hughes*, 206 Ark. 946, 178 S.W.2d 236 (1944); *Dill v. Snodgrass*, 213 Ark. 526, 211 S.W.2d 440 (1948); *Phillips v. Michel*, 217 Ark. 865, 233 S.W.2d 551 (1950); *Wimberly v. Norman*, 221 Ark. 319, 253 S.W.2d 222 (1952); *Weston v. Hilliard*, 232 Ark. 535, 338 S.W.2d 926 (1960); *United States v. 738.75 Acres of Land*, 263 F. Supp. 608 (E.D. Ark. 1967); *Harrison v. Collins*, 247 Ark. 210, 444 S.W.2d 861 (1969); *Schuman v. Martin*, 259 Ark. 4, 531 S.W.2d 26 (1975).

Allegation that the lands were "wild" would normally bring them within the purview of this section and § 18-11-103. *McKim v. McLiney*, 250 Ark. 423, 465 S.W.2d 911 (1971).

Payment.

A redemption from tax sale is not a payment of taxes under this section. *Wyse v. Johnston*, 83 Ark. 520, 104 S.W. 204 (1907); *Walsh v. Certain Lands*, 209 Ark. 320, 190 S.W.2d 447 (1945).

The tax may be paid in a county other than that in which the lands lie. *Stout Lumber Co. v. Treadwell*, 165 Ark. 138, 263 S.W. 51 (1924).

Payments must be made by persons in the line of title while they claim title. *France v. Butcher*, 165 Ark. 312, 264 S.W. 931 (1924).

Payment of taxes for seven years by one co-tenant is not equivalent to actual possession so as to ripen into title by adverse possession as against other co-tenants. *Seawood v. Ozan Lumber Co.*, 221 Ark. 196, 252 S.W.2d 829 (1952).

Plaintiffs who had color of title must prove who actually paid the taxes and mere evidence of assessment in their name was insufficient. *Horn v. Blaney*, 268 Ark. 885, 597 S.W.2d 109 (Ct. App. 1980).

Possession.

Under this section, payment of taxes is equivalent to possession and actual possession by the defendant is not an indispensable prerequisite to the right of a party to bring an ejectment suit against him. *Brasher v. Taylor*, 109 Ark. 281, 159 S.W. 1120 (1913).

Payment of taxes for more than seven years in succession on unenclosed and unimproved lands confers title, and constructive possession follows the title, and can only be defeated by actual possession adverse thereto. *Union Sawmill Co. v. Pagan*, 175 Ark. 559, 299 S.W. 1012 (1927).

The collection of rentals for the use of unenclosed lands is sufficient evidence of actual possession which will interrupt the constructive possession created through the payment of taxes under this section. *Hubble v. Grimes*, 211 Ark. 49, 199 S.W.2d 313 (1947).

Holder of deed to whole tract who lived on part of tract, but who did not cultivate the other part which reverted to wild and unimproved land was not entitled to the other part by adverse possession as against holder of tax title who paid taxes for a period in excess of statutory period. *Wimberly v. Norman*, 221 Ark. 319, 253 S.W.2d 222 (1952).

The rule that constructive possession of wild and unimproved lands was usually deemed to be in the holder of legal title but where neither party had actual possession, constructive possession was deemed to be in the holder of superior title applied where the lands were wild and unimproved unless the holder of an inferior title had continuously paid the taxes for statutory period. *McKim v. McLiney*, 250 Ark. 423, 465 S.W.2d 911 (1971).

This section and § 18-11-103 were not applicable where two or more parties had adverse constructive possession. *McKim v. McLiney*, 250 Ark. 423, 465 S.W.2d 911 (1971).

Where property was returned to its natural state by 1953 and ceased to be enclosed by 1973, and defendant, under color of title, made payment of taxes on the land for more than seven years thereafter, the defendant's legal title had been reacquired by adverse possession from the plaintiffs who had previously acquired it through adverse possession. *Appollos v.*

International Paper Co., 34 Ark. App. 205, 808 S.W.2d 786 (1991).

Trial court's conclusions that an adjoining landowner claimed land as its own and that it was the owner of the land by adverse possession were not erroneous because a witness's affidavit established that, since the early 1900s, the adjoining landowner paid taxes on the land, harvested timber, maintained boundary lines, leased the land, and restricted access to the land; no one ever claimed ownership of the property or objected to any of the acts or dominion of the adjoining landowner until a property owner filed his quiet title complaint. *Dye v. Anderson Tully Co.*, 2011 Ark. App. 503, 385 S.W.3d 342 (2011).

Running of Statutory Period.

One who has, under color of title, paid the taxes on wild and unimproved land for six years consecutively has no right, as against the owner of the land, to enjoin the latter from paying the taxes for the seventh year in order that the former might acquire a title by seven years' payment of taxes. *McCastlain v. Wylie*, 139 Ark. 326, 213 S.W. 743 (1919).

This section is not a statute of limitations, but only makes the payment of taxes under the conditions named in the section a constructive possession, and it is only by applying thereto the general statute of limitations that such possession can ripen into a title by limitation. *Southern Lumber Co. v. Arkansas Lumber Co.*, 176 Ark. 906, 4 S.W.2d 928 (1928); *Hubble v. Grimes*, 211 Ark. 49, 199 S.W.2d 313 (1947); *Coulter v. Anthony*, 228 Ark. 192, 308 S.W.2d 445 (1957), appeal dismissed and cert. denied, 358 U.S. 73, 79 S. Ct. 153, 3 L. Ed. 2d 118 (1958).

Statutory period for payment of taxes runs from date of first payment. *Edge v. Buschow Lumber Co.*, 218 Ark. 903, 239 S.W.2d 597 (1951).

—Actions by Original Owner.

Payment of taxes for seven years is insufficient if the owner brings suit before the expiration of seven years from the date of the first payment. *Updegraff v. Marked Tree Lumber Co.*, 83 Ark. 154, 103 S.W. 606 (1907); *Bradley Lumber Co. v. Langford*, 109 Ark. 594, 160 S.W. 866 (1913).

In order to bar a suit to remove a cloud on the title to wild and unimproved land

by laches, a purchaser under a void tax title and his privies must have, prior to the commencement of the suit, paid the taxes upon the land under color of title for at least seven years. *Tatum v. Arkansas Lumber Co.*, 103 Ark. 251, 146 S.W. 135 (1912).

The failure to pay taxes on unimproved lands for a long period of time, together with increased value of land constitutes an abandonment and an action seeking equitable relief against one who has paid taxes under those circumstances for more than statutory period is barred by laches. *McGill v. Adams*, 120 Ark. 249, 179 S.W. 489 (1915); *Wimberly v. Norman*, 221 Ark. 319, 253 S.W.2d 222 (1952).

The title to unimproved and unenclosed land will not be barred by the payment of taxes thereon by one claiming under color of title for a period of less than seven consecutive years, and such continuity is broken where the owner brings suit for the land within seven years from the date of the first payment. *Slaughter v. Cornie Stave Co.*, 172 Ark. 952, 291 S.W. 69 (1927).

One claiming the fee simple under a deed from the life tenant did not take title adverse to the remainderman until the death of the life tenant and ejectment suit brought within the statutory period after life tenant's death was not barred by the statute of limitations. *Bradley Lumber Co. v. Burbridge*, 213 Ark. 165, 210 S.W.2d 284 (1948).

Decree in favor of assignee from adverse possessor who paid taxes on property for seven years affirmed under seven year statute of limitations, and laches in suit by original grantor of property. *Buckner v. Sewell*, 216 Ark. 221, 225 S.W.2d 525 (1949).

—Persons Under Disabilities.

This section does not run against infants or persons non compos mentis. *Deane v. Moore*, 105 Ark. 309, 151 S.W. 286 (1912).

Acquisition of land by payment of taxes under color of title for more than seven years under this section did not bar redemption of land from void tax sale by heirs of incompetent under authority of § 26-37-305. *Rinke v. Schuman*, 246 Ark. 976, 440 S.W.2d 765 (1969).

Cited: *Brandon v. Parker*, 124 Ark. 379, 187 S.W. 312 (1916); *Koonce v. Woods*,

211 Ark. 440, 201 S.W.2d 748 (1947); Zackery v. Warmack, 213 Ark. 808, 212 S.W.2d 706 (1948); Dierks Lumber & Coal Co. v. Vaughn, 131 F. Supp. 219 (E.D. Ark. 1954); Ball v. Messmore, 226 Ark. 256, 289 S.W.2d 183 (1956); Baker v. Certain Lands, 19 Ark. App. 253, 720 S.W.2d 318 (1986).

18-11-103. Payment of taxes on wild and unimproved land — Presumption of color of title.

Payment of taxes on wild and unimproved land in this state by any person or his or her predecessor in title for a period of fifteen (15) consecutive years shall create a presumption of law that the person, or his or her predecessor in title, held color of title to the land prior to the first payment of taxes made as stated and that all the payments were made under color of title.

History. Acts 1929, No. 199, § 1; Pope's Dig., §§ 8921, 13601; A.S.A. 1947, § 37-103.

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CASE NOTES

ANALYSIS

Applicability.

Description.

Method of Taxation.

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Applicability.

This statute was held not available to landowner claiming adjoining land where evidence showed he had not been in possession of disputed land for statutory period and had never paid any taxes on the land. Wallace v. Snow, 197 Ark. 632, 124 S.W.2d 209 (1939).

Description.

Where tract of wild unimproved land was deeded to school district under a faulty description, and land was sold for taxes to defendants under same faulty

description who paid taxes on land for period longer than the statutory period, defendants acquired title to land by virtue of payment of taxes. Junction City Special Sch. Dist. No. 75 v. Whiddon, 220 Ark. 530, 249 S.W.2d 990 (1952).

An indefinite tax deed did not provide color of title. Darr v. Lambert, 228 Ark. 16, 305 S.W.2d 333 (1957).

Where a claimant's title was defective because of inadequate description in his deed but it was apparent he was claiming title to all of the tract that remained after a prior deed which specifically described the part conveyed, he obtained color of title by paying the taxes on the land for a period longer than the statutory period. Charles v. Pierce, 238 Ark. 22, 378 S.W.2d 213 (1964).

Where parts of a tract were conveyed with indefinite descriptions, the conveyances could not convey color of title even though taxes had been paid by holder and predecessors for more than statutory period, and fact that both portions were later acquired by the same person under such indefinite descriptions and he then paid taxes on the entire tract was of no avail

where the period during which he held the entire tract was less than statutory period. *Charles v. Pierce*, 238 Ark. 22, 378 S.W.2d 213 (1964).

Title under this section was not established where records of tax payment contained descriptions too indefinite to identify the land upon which taxes were paid. *Corn v. Arkansas Whse. Corp.*, 243 Ark. 130, 419 S.W.2d 316 (1967).

Where description of land on which taxes are paid is indefinite and does not serve to fix geographic location, this section does not apply. *Greif Bros. Cooperage Corp. v. United States Gypsum Co.*, 341 F.2d 167 (8th Cir. 1965).

Method of Taxation.

The assessment and taxation by sections or sectional quarters and accretions is good and sufficient to bring into operation this section absent a severance of the accretions or relictions by platting and extending the sectional, township, and range lines. *United States Gypsum Co. v. Greif Bros. Cooperage Corp.*, 389 F.2d 252 (8th Cir. 1968).

Mineral Interests.

Where defendant obtained tax deed to mineral interest and paid taxes subsequent thereto, she did not gain color of title to the mineral interest since she never took actual possession of the minerals by opening and operating mines as required to claim adverse possession of mineral rights. *Garvan v. Potlatch Corp.*, 278 Ark. 414, 645 S.W.2d 957 (1983). See also *Gilbreath v. Union Bank*, 309 Ark. 360, 830 S.W.2d 854 (1992).

Nature of Lands.

The words "unimproved" and "unenclosed" and the word "wild" have been used interchangeably and both this section and § 18-11-102 apply to urban as well as rural unoccupied, wild, or unenclosed land. *Schmeltzer v. Scheid*, 203 Ark. 274, 157 S.W.2d 193 (1941).

No color of title created under this section where lands were enclosed or improved. *Phillips v. Michel*, 217 Ark. 865, 233 S.W.2d 551 (1950); *United States v. 738.75 Acres of Land*, 263 F. Supp. 608 (E.D. Ark. 1967).

Allegation that lands are "wild" would normally bring them within the purview of this section and § 18-11-102. *McKim v.*

McLiney, 250 Ark. 423, 465 S.W.2d 911 (1971).

Payment.

Where decedent was a trustee of property and paid taxes on the property in his name, his descendants could not claim the land by adverse possession although they had continued to pay the taxes after his death. *Rolfe v. French*, 254 Ark. 62, 491 S.W.2d 383 (1973).

Where the plaintiffs clearly had color of title to the property which was the subject of this quiet title action, the decree quieting title in the plaintiffs should not have been entered on the mere evidence that the property was assessed in the name of the plaintiffs, and the court should have required the plaintiffs to prove who actually paid the taxes from 1950 to 1978. *Horn v. Blaney*, 268 Ark. 885, 597 S.W.2d 109 (Ct. App. 1980).

Possession.

This section and § 18-11-102 were not applicable where two or more parties had adverse constructive possession. *McKim v. McLiney*, 250 Ark. 423, 465 S.W.2d 911 (1971).

The rule that constructive possession of wild and unimproved lands was usually deemed to be in the holder of legal title but where neither party had actual possession, constructive possession was deemed to be in the holder of superior title applied where the lands were wild and unimproved unless the holder of an inferior title had continuously paid the taxes for statutory period. *McKim v. McLiney*, 250 Ark. 423, 465 S.W.2d 911 (1971).

Paying taxes on wild and unimproved land not only gives a claimant color of title, but constructive possession as well. *Hunter v. Robertson*, 73 Ark. App. 178, 40 S.W.3d 337 (2001).

Trial court's conclusions that an adjoining landowner claimed land as its own and that it was the owner of the land by adverse possession were not erroneous because a witness's affidavit established that, since the early 1900s, the adjoining landowner paid taxes on the land, harvested timber, maintained boundary lines, leased the land, and restricted access to the land; no one ever claimed ownership of the property or objected to any of the acts or dominion of the adjoining landowner until a property owner filed his quiet title

complaint. *Dye v. Anderson Tully Co.*, 2011 Ark. App. 503, 385 S.W.3d 342 (2011).

Reversion.

Land which was transferred by the state to the Game and Fish Commission pursuant to § 15-41-109 reverted to the state where the lands were not developed during the first two years after the commission received its title, and the taxpayer who paid taxes on the land for more than 15 years in unbroken succession redeemed the property. *Baker v. Certain Lands*, 19 Ark. App. 253, 720 S.W.2d 318 (1986).

Tax-Exempt Property.

Parties who claimed adverse possession of property did not satisfy the requirements of this section where they and their predecessors paid ad valorem taxes on the property for 13 years and, before that, the property was tax-exempt; the period that the property was tax-exempt did not tack with the 13 years for which taxes were paid, as payment of taxes involves positive action by a claimant and serves as constructive notice to the true owner of the action through the recording of the payment in the collector's office. *Hunter v. Robertson*, 73 Ark. App. 178, 40 S.W.3d 337 (2001).

Title.

Where the defendant has paid taxes on wild land belonging to the plaintiff for four years under an invalid quitclaim deed, the plaintiff is entitled to have his title quieted, since the defendant's payment of

taxes under such color of title would in time ripen into title. *Fletcher v. Malone*, 145 Ark. 211, 224 S.W. 629 (1920).

Both this section and § 18-11-102 contemplate that another person has the original paper title. *Schmeltzer v. Scheid*, 203 Ark. 274, 157 S.W.2d 193 (1941).

Title properly vests under this section when payment of taxes incident to valid description is made for statutory period. *Greif Bros. Cooperage Corp. v. United States Gypsum Co.*, 341 F.2d 167 (8th Cir. 1965).

—Presumption of Color of Title.

Payment of taxes held to raise legal presumption of color of title prior to first payment. *Burbridge v. Smyrna Baptist Church*, 212 Ark. 924, 209 S.W.2d 685 (1948); *Bryant v. Chicago Mill & Lumber Co.*, 120 F. Supp. 463 (E.D. Ark.), *aff'd*, 216 F.2d 727 (8th Cir. 1954); *Wheeler v. Ayers*, 253 Ark. 427, 486 S.W.2d 527 (1972).

Bona fide purchasers of land by presumption of law have title where they are in possession and they or their predecessors in title have paid taxes for more than statutory period on such wild, unimproved tracts. *Coulter v. O'Kelly*, 226 Ark. 836, 295 S.W.2d 753 (1956); *Baker v. Certain Lands*, 19 Ark. App. 253, 720 S.W.2d 318 (1986).

Cited: *Koonce v. Woods*, 211 Ark. 440, 201 S.W.2d 748 (1947); *Bradley Lumber Co. v. Burbridge*, 213 Ark. 165, 210 S.W.2d 284 (1948); *Dierks Lumber & Coal Co. v. Vaughn*, 131 F. Supp. 219 (E.D. Ark. 1954); *Schuman v. Martin*, 259 Ark. 4, 531 S.W.2d 26 (1975).

18-11-104. Right of possession not impaired by descent cast.

The right of any person to the possession of any lands or tenements shall not be impaired or affected by a descent cast in consequence of the death of any person in possession of the estate.

History. Rev. Stat., ch. 91, § 3; C. & M. Dig., § 6945; Pope's Dig., § 8923; A.S.A. 1947, § 37-105.

18-11-105. Surface rights of cotenants or tenants-in-common — Waiver.

(a) All right or claim of right, title, interest, equity, and estate by a cotenant or tenant-in-common, including minors, to surface rights in real property, which the cotenant or tenant-in-common is not possess-

ing, having been created by intestate descent and distribution or under the testate distribution of those surface rights by the cotenant or tenant-in-common's grantor, shall be conclusively deemed waived, abandoned, and forfeited to the other person or legal entity, holding title as cotenant, or tenant-in-common, and in possession, on the condition that:

(1) The cotenant or tenant-in-common, not in possession, and whose whereabouts are unknown, has made no written demand upon the cotenant or tenant-in-common, in possession, for rents, profits, or possession of the surface rights for a twenty-year period; and

(2)(A)(i) After the expiration of the twenty-year period, whether commencing before or after July 15, 1991, the cotenant or tenant-in-common, in possession, publishes notice in a newspaper of general circulation in the county in which the surface rights are located, of an intent to oust the cotenant or tenant-in-common, not in possession, from the lands described in the notice, as a result of the abandonment and waiver referred to in this subsection.

(ii) The notice shall be published once a week for two (2) consecutive weeks.

(B)(i) Not less than ninety (90) days nor more than three hundred sixty-five (365) days following the last date of publication referred to in this section, the cotenant or tenant-in-common, in possession, may maintain an action to quiet title in the county in which the surface rights are situated and located, with the rights or claim of right of the cotenant or tenant-in-common, not in possession, having been conclusively deemed waived, abandoned, and forfeited to the person or legal entity, holding as cotenant, or tenant-in-common, and in possession thereof.

(ii) Upon successful prosecution of the action to quiet title, the cotenant, or tenant-in-common, in possession, shall hold the surface rights free and clear of any claim or title in the cotenant or tenant-in-common, including minors, not in possession.

(b) The following form of notice shall be sufficient, for purposes of this section:

"_____, the owner and possessor of the
(Name)

surface rights to the real property described below, do hereby state, affirm and give notice to any missing or absent claimants, whose whereabouts are unknown, to said real property of my intent to oust said missing or absent claimant, who has made no written claim for rents, profits or possession of said real property during the last twenty (20) years and intend to institute an action to quiet title to such real property. The real property referred to is described as follows:

Subscribed and sworn to before me this ____ day of _____, ____.
(Seal)"

(c) For purposes of the action to quiet title referred to in this section, an affidavit or other evidence denying the receipt of written demand

referred to in subdivision (a)(1) of this section, above, and an affidavit or other evidence affirming the publication of notice of intent to oust referred to in subdivision (a)(2) of this section, shall be sufficient evidence to sustain the plaintiff's burden of proof in the action, with no other evidence necessary. It shall not be necessary that the notice or the action to quiet title name the missing or absent cotenant or tenant-in-common, not in possession, as those missing persons may be collectively referred to as "missing or absent claimants" to the lands described in the notice or action.

(d)(1) This section shall not apply to mineral rights or other subsurface rights held by cotenants or tenants-in-common.

(2) For purposes of this section, cotenants or tenants-in-common shall include joint tenants.

History. Acts 1991, No. 660, §§ 1-3.

18-11-106. Adverse possession.

(a) To establish adverse possession of real property, the person and those under whom the person claims must have actual or constructive possession of the real property being claimed and have either:

(1)(A) Held color of title to the real property for a period of at least seven (7) years and during that time paid ad valorem taxes on the real property.

(B) For purposes of this subdivision (a)(1), color of title may be established by the person claiming adversely to the true owner by paying the ad valorem taxes for a period of at least seven (7) years for unimproved and unenclosed land or fifteen (15) years for wild and unimproved land, provided the true owner has not also paid the ad valorem taxes or made a bona fide good faith effort to pay the ad valorem taxes which were misapplied by the state and local taxing authority; or

(2) Held color of title to real property contiguous to the real property being claimed by adverse possession for a period of at least seven (7) years and during that time paid ad valorem taxes on the contiguous real property to which the person has color of title.

(b)(1) The requirements of subsection (a) of this section with regard to payment of ad valorem taxes shall not apply to a person or entity exempt from the payment of ad valorem taxes by law.

(2) For the person or entity exempt from the payment of ad valorem taxes to establish adverse possession of real property, the person or entity must have:

(A) Actual or constructive possession of the real property being claimed and held color of title to the real property for a period of at least seven (7) years; or

(B) Actual or constructive possession of the real property being claimed and held color of title to the real property contiguous to the real property being claimed by adverse possession for a period of at least seven (7) years.

(c) The requirements of this section are in addition to all other requirements for establishing adverse possession.

(d)(1) This section shall not repeal any requirement under existing case law for establishing adverse possession but shall be supplemental to existing case law.

(2) This section shall not diminish the presumption of possession of unimproved and unenclosed land created under § 18-11-102 by payment of taxes for seven (7) years under color of title or the presumption of color of title on wild and unimproved land created under § 18-11-103 by payment of taxes for fifteen (15) consecutive years.

History. Acts 1995, No. 776, § 1; 2005, No. 84, § 1.

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CASE NOTES

ANALYSIS

In General.

Adverse Possession Not Shown.

Adverse Possession Shown.

Jurisdiction.

Property Contiguous to Property Claimed.
Statutory Period.

Statutory Proof Not Applicable.

In General.

Although defendant conceded that plaintiff met the requirements of subdivision (a)(2) of this section by paying taxes on said lots for at least seven years, there was insufficient evidence that plaintiff's occupation of the property was exclusive, continuous, notorious, and undertaken with an intent to hold the property as against the true owner and, thus, the trial court erred in finding in plaintiff's favor. *Thompson v. Fischer*, 364 Ark. 380, 220 S.W.3d 622 (2005).

A property owner had not acquired the disputed property by adverse possession by placing a lamp and benches thereon

and by keeping it clear of debris because a church, which previously owned the property, had not been charged with actual or constructive notice that the disputed property was being claimed by the owner, and continued to use the disputed property for its maintenance activities. *Follett v. Fitzsimmons*, 103 Ark. App. 82, 286 S.W.3d 742 (2008).

Neighbors failed to show adverse use of a landowner's property because they failed to comply with this section by showing payment of taxes and failed to show that their use of the property was notorious, hostile, and exclusive; rather, the use was permissive. The court could not consider property tax receipts submitted along with the neighbors' motion for new trial. *Barnett v. Gomance*, 2010 Ark. App. 109, 377 S.W.3d 317 (2010).

Judgment ruling that appellant did not own any property on the northeast bank of the river where it flowed by appellees' lots and finding that appellant failed to establish adverse possession was affirmed; appellant's payment of taxes was irrelevant

because appellant did not have color of title to the land in dispute. *Rio Vista, Inc. v. Miles*, 2010 Ark. App. 190, 374 S.W.3d 698 (2010).

Summary judgment was properly awarded to defendant on plaintiff's adverse possession claim because the trial court did not err in finding that plaintiff was required to prove that plaintiff had paid taxes on the property; the amendment to the statute took effect in 1995 and plaintiff's claim of adverse possession had not yet begun to run, let alone vest. *Cleary v. Sledge Props.*, 2010 Ark. App. 755, 379 S.W.3d 680 (2010).

Trial court erred in finding that appellees acquired title to property once owned by appellants by adverse possession because while the evidence showed that appellees paid taxes from 1998 through 2007 on 30.1 acres in two quarter-quarter sections, the records did not show that they paid taxes on the specific piece of property in dispute. *Gibbs v. Stiles*, 2011 Ark. App. 302, 383 S.W.3d 453 (2011).

Although a landowner did not proffer any documentary evidence that the landowner had paid taxes on an easement area, the parties stipulated that the landowner had paid taxes on the property to which the landowner had record title. This stipulation satisfied the statutory requirement of paying taxes on contiguous property for seven years. *Parkerson v. Brown*, 2013 Ark. App. 718, 430 S.W.3d 864 (2013).

Adverse Possession Not Shown.

Property owners had not established adverse possession of property between the survey line and the old fence because, even after clearing, photographs depicted a fence line intertwined and covered with vines, briars, bushes, and bramble to the point that the fence was not even visible, and the fence was in a thick, overgrown tree line that was invisible from the adjoining landowners' side of the thicket. The fence thus was not sufficient to put the adjoining landowners or their predecessors on notice of adverse possession. *Emerson v. Linkinogger*, 2011 Ark. App. 234, 382 S.W.3d 806 (2011).

One appellant testified that he owned and paid the taxes on property contiguous to the land in dispute and he was in possession of land lying north of fence through a pond, and further that he

cleared and maintained that property, but the evidence supported appellees' position that the use of the property by appellants and their predecessors was permissive prior to a survey being completed, and until that survey was done, there was little evidence that appellees received notice of an adverse use; the finding that appellants did not establish adverse possession was not clearly erroneous. *Horton v. Taylor*, 2012 Ark. App. 469, 422 S.W.3d 202 (2012).

Order granting the motion to dismiss was affirmed, as the decree quieting title was issued in May 2011, the individual took possession in June 2004, and the requirement of seven years' continuous possession was not met. *Chiodini v. Lock*, 2014 Ark. App. 219 (2014).

Appellants did not adversely possess the disputed property because appellees had record title to the disputed tract and had paid taxes on it; appellants' surveyor and forestry consultant perceived appellants' fence to be a convenience fence rather than a boundary line; proof that appellants sold timber once could not sustain their adverse possession claim as the logging activity did not occur over seven years before they filed their litigation; and testimony that 20 or more cattle were intermittently run on the disputed property and that two horses were kept on the disputed property after 1995 did not show acts of possession sufficient to put appellees on notice that their land was held under an adverse claim of ownership. *Laferty v. Everett*, 2014 Ark. App. 332, 436 S.W.3d 479 (2014).

Adverse Possession Shown.

Appellee proved an adverse possession claim as he showed he began exclusively using a property with hostile intent that was understood by his co-tenants, more than seven years before 1995, and therefore, his claim vested before this section became effective as even though appellee did not live on the property for the entire time since his mother had died, everyone who had lived on the property since that time had done so with appellee's permission, and appellee used the property as his own and threatened his co-tenants. *Sutton v. Gardner*, 2011 Ark. App. 737, 387 S.W.3d 185 (2011).

Conversation appellants claimed to have had with a predecessor in title nearly

20 years after her title had vested by adverse possession did not cast doubt on her title, plus the trial court was not clearly erroneous in failing to find that appellants proved abandonment merely by their evidence that the condition of the property had deteriorated while no one was living on it; the trial court's finding that appellees had proven the necessary elements of adverse possession was not clearly erroneous. *Fletcher v. Stewart*, 2015 Ark. App. 105, 456 S.W.3d 378 (2015).

Jurisdiction.

Where a railroad filed an ejectment action against respondents, who occupied its right-of-way, the trial court erred in not dismissing respondents' counterclaim seeking to quiet title in the right-of-way and alleging abandonment and adverse possession; under 49 U.S.C.S. § 10501(b), such claims were exclusively within the jurisdiction of the Surface Transportation Board. *Ouachita R.R., Inc. v. Circuit Court*, 361 Ark. 333, 206 S.W.3d 811 (2005).

Property Contiguous to Property Claimed.

The plaintiff did not hold color of title to real property contiguous to the property claimed by adverse possession where a street separated the two properties. *Patrick v. McSperritt*, 64 Ark. App. 310, 983 S.W.2d 455 (1998).

Trial court erred in denying plaintiffs' motion for a new trial because subdivision (a)(2) of this section required only that the real property owned by plaintiffs be contiguous to the property claimed by adverse possession; thus, the matter was remanded to determine if that was the case. *Roberts v. Boyd*, 94 Ark. App. 345, 230 S.W.3d 301 (2006).

Because appellants owned property contiguous to the disputed property on which they had paid taxes for at least seven years, they had their own separate right to bring a claim for adverse possession, without regard to whether the court stated so in its order. *Mancabelli v. Gies*, 2015 Ark. App. 67, 454 S.W.3d 785 (2015).

Statutory Period.

Mislabeling the seven-year continuous possession requirement as a statute of limitations led to the individual's argument that the circuit court could not con-

sider the affirmative defense because it had not been pleaded or argued, but his argument lacked foundation because the requirement of continuous possession is not a statute of limitations, as referred to in Ark. R. Civ. P. 8(c). *Chiodini v. Lock*, 2014 Ark. App. 219 (2014).

Statutory Proof Not Applicable.

Statutory changes made in 1995 to this section, which required one who sought to claim land by adverse possession to show payment of taxes on the property, were found not to be applicable to property owners whose rights to the disputed land had vested prior to that time; thus, where a neighboring property owner was found to have deliberately trespassed onto the land and destroyed a fence, caused ruts in the grass, and drove over a vegetable garden, all in violation of a prior trial court order restricting his right to be on that land, awards of treble damages pursuant to § 18-60-102(a) and attorney's fees and costs were proper. *Schrader v. Schrader*, 81 Ark. App. 343, 101 S.W.3d 873 (2003).

Appellate court reversed a trial court's order quieting title in favor of landowners as the property had been divided by the barbed wire fence for more than 35 years, the landowner's possession of the land up to the fence was visible, notorious, distinct, exclusive, hostile, and with the intent to hold against the property owners and, since their claim of adverse possession accrued before 1995, the landowners were not required to show that they had paid property taxes on the land. *Boyette v. Vogelpohl*, 92 Ark. App. 436, 214 S.W.3d 874 (2005).

Because statutory changes imposing additional requirements to show adverse possession were passed in 1995, those additional requirements were not applicable where one claimed possession of land since 1985. *Ford v. Howard*, 2009 Ark. App. 196, 300 S.W.3d 505 (2009).

Although appellant argued appellee did not prove an adverse possession claim under this section, contending that appellee failed to show she paid the taxes on the subject property, a trial court properly found appellee's adverse possession claim vested in 1973, prior to the enactment of the additional statutory requirements in this section, including payment of taxes, and because the additional statutory ele-

ments were not applied retroactively, appellee was not subject to the statute's additional requirements. *Smith v. Smith*, 2011 Ark. App. 598, 385 S.W.3d 902 (2011).

If appellees' rights vested before 1995, as the trial court found, appellees had to prove only the common-law elements of adverse possession, and appellants' contention that color of title was necessary for all adverse-possession claims was incorrect. *Fletcher v. Stewart*, 2015 Ark. App. 105, 456 S.W.3d 378 (2015).

Circuit court did not err in denying a neighbor's petition for declaratory judgment and quiet title because she failed to

prove the common-law elements of adverse possession as to the disputed property, a prior owner testified that the ditch was entirely within an adjoining owner's property boundary, and it was unnecessary for the circuit court to rule on the additional statutory elements where the seven-year period necessary to establish adverse possession would have vested long before 1995. *Morrison v. Carruth*, 2015 Ark. App. 224, 459 S.W.3d 317 (2015).

Cited: *Dohle v. Duffield*, 2012 Ark. App. 217, 396 S.W.3d 780 (2012); *Teague v. Canfield*, 2014 Ark. App. 712 (2014).

SUBCHAPTER 2 — PROPERTY OF RELIGIOUS SOCIETIES

SECTION.

18-11-201. Trustees to hold in perpetual succession.

SECTION.

18-11-202. Authority of trustees.

18-11-201. Trustees to hold in perpetual succession.

All lands and tenements, not exceeding forty (40) acres, that have been, or hereafter may be, conveyed by purchase to any person as trustee in trust for the use of any religious society within this state, either for a meeting house, burying ground, campground, or residence for their preacher, shall descend with the improvements and appurtenances in perpetual succession in trust to the trustee or trustees as shall, from time to time, be elected or appointed by any religious society, according to the rules and regulations of the society.

History. Rev. Stat., ch. 125, § 1; C. & M. Dig., § 8637; Pope's Dig., § 11368; A.S.A. 1947, § 50-201.

Cross References. Rule against perpetuities inapplicable to trust funds for perpetual care of burial lots, § 20-17-904.

RESEARCH REFERENCES

Ark. L. Rev. Comment — A Survey of Testamentary Capacity — Proof, 11 Ark. L. Rev. 84.

Christopher W. Wynne, Comment: WWJD: A True Neutral Principles Ap-

proach? Arkansas Courts Should Take Another Look, 65 Ark. L. Rev. 481 (2012).

CASE NOTES

ANALYSIS

Neutral-Principles Approach.
Use of Land.

Neutral-Principles Approach.

Circuit court did not err in quieting title in favor of the worship center, because under the neutral-principles approach, nothing in the language of the deed suggested that the owner had the intention of creating a trust in favor of either the national church or the state church, and neither the national church nor the state church had an ownership interest in the

property at the time of the conveyance and neither was a party to the transaction. *Arkansas Annual Conf. of the AME Church, Inc. v. New Direction Praise & Worship Ctr., Inc.*, 375 Ark. 428, 291 S.W.3d 562, cert. denied, 558 U.S. 818, 130 S. Ct. 70, 175 L. Ed. 2d 26 (2009).

Use of Land.

The trustees of a church located on a tract of land held in succession so long as the land was used for religious purposes and only so much thereof as was reasonably necessary for the intended use. *Burbridge v. Smyrna Baptist Church*, 212 Ark. 924, 209 S.W.2d 685 (1948).

18-11-202. Authority of trustees.

The trustee or trustees of any religious society shall have the same power to defend and prosecute suits at law or in equity and do all other acts for the protection, improvement, and preservation of trust property as individuals may do in relation to their individual property.

History. Rev. Stat., ch. 125, § 2; C. & M. Dig., § 8638; Pope's Dig., § 11369; A.S.A. 1947, § 50-202.

RESEARCH REFERENCES

Ark. L. Rev. Christopher W. Wynne, Comment: WWJD: A True Neutral Principles Approach? *Arkansas Courts Should*

Take Another Look, 65 *Ark. L. Rev.* 481 (2012).

CASE NOTES

ANALYSIS

Mortgages.
Neutral-Principles Approach.
Parties.

Mortgages.

Trustees of a church are authorized to execute notes and mortgages on the church's realty to raise money to construct a church. *Hale v. Central Bank*, 184 Ark. 829, 43 S.W.2d 530 (1931).

Neutral-Principles Approach.

Circuit court did not err in quieting title in favor of the worship center, because under the neutral-principles approach, nothing in the language of the deed sug-

gested that the owner had the intention of creating a trust in favor of either the national church or the state church, and neither the national church nor the state church had an ownership interest in the property at the time of the conveyance and neither was a party to the transaction. *Arkansas Annual Conf. of the AME Church, Inc. v. New Direction Praise & Worship Ctr., Inc.*, 375 Ark. 428, 291 S.W.3d 562, cert. denied, 558 U.S. 818, 130 S. Ct. 70, 175 L. Ed. 2d 26 (2009).

Parties.

Elders of church are proper parties to sue where church property is involved. *Young v. Knox*, 165 Ark. 129, 263 S.W. 52 (1924).

SUBCHAPTER 3 — RECREATIONAL USES — OWNER'S LIABILITY

SECTION.

- 18-11-301. Purpose.
- 18-11-302. Definitions.
- 18-11-303. Construction.
- 18-11-304. Duty of care.
- 18-11-305. Owner's immunity from liability.

SECTION.

- 18-11-306. Land leased to state or political subdivision — Conservation easement.
- 18-11-307. Exceptions to owner's immunity.

RESEARCH REFERENCES

ALR. Statute limiting landowner's liability for personal injury to recreational user. 47 A.L.R.4th 262.

Ark. L. Notes. Brill, Arkansas Law of Damages, Fifth Edition, Chapter 30: Real Property, 2004 Arkansas L. Notes 9.

Ark. L. Rev. Strendowski, Case Notes: Tort Liability of Owners and Possessors of Land — A Single Standard of Reasonable Care Under the Circumstances Towards Invitees and Licensees, 33 Ark. L. Rev. 194.

CASE NOTES

Applicability.

The United States is entitled to the benefit of this subchapter, if applicable, when it is sued under the Federal Tort

Claims Act, 28 U.S.C. §§ 1346 and 2671 et seq. *Roten v. United States*, 850 F. Supp. 786 (W.D. Ark.), *aff'd* without op., 39 F.3d 1184 (8th Cir. 1994).

18-11-301. Purpose.

The purpose of this subchapter is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes.

History. Acts 1965, No. 51, § 1; A.S.A. 1947, § 50-1101.

RESEARCH REFERENCES

Ark. L. Rev. The Arkansas Recreational-Use Statute: Past, Present, and Future Application for Arkansas Land-

owners and Recreational Users of Land, 60 Ark. L. Rev. 849.

CASE NOTES

In General.

Since the purpose of this subchapter is to encourage landowners (including the United States) to make areas available to the public for recreational purposes and thus limit their liability, it is reasonable to conclude that a condition or structure

which is natural, such as high cliffs, should not be considered ultra-hazardous within the meaning of the § 18-11-307(1) exception to this subchapter. *Roten v. United States*, 850 F. Supp. 786 (W.D. Ark.), *aff'd* without op., 39 F.3d 1184 (8th Cir. 1994).

Injured persons met their burden of proof under the Arkansas Recreational Use Statute, § 18-11-301 et seq., by showing that the landowners maliciously failed to guard or warn against a known ultra-hazardous condition and, therefore, the landowners were not immune from liability to persons entering the landowners' property for recreational purposes, as provided in the immunity exception under § 18-11-307(1). *Carr v. Nance*, 2010 Ark. 497, 370 S.W.3d 826 (2010).

Immunity under the Arkansas Recreational Use Statute, §§ 18-11-301 — 18-11-307, is in derogation of the common law, and any statute in derogation of the common law will be strictly construed. *Roeder v. United States*, 2014 Ark. 156, 432 S.W.3d 627 (2014).

Cited: *Mandel v. United States*, 793 F.2d 964 (8th Cir. 1986); *Carlton ex rel. Carlton v. Cleburne County*, 93 F.3d 505 (8th Cir. 1996).

18-11-302. Definitions.

As used in this subchapter:

(1) "Aviation" means taking off, flying, or landing an airplane or aircraft;

(2) "Charge" means an admission fee for permission to go upon or use the land, but does not include:

(A) The sharing of game, fish, or other products of recreational use; or

(B) Contributions in kind, services, or cash paid to reduce or offset costs and eliminate losses from recreational use;

(3) "Land" means land, roads, water, watercourses, airstrips, private ways and buildings, structures, and machinery or equipment when attached to the realty;

(4)(A) "Malicious" means an intentional act of misconduct that the actor is aware is likely to result in harm.

(B) "Malicious" does not mean negligent or reckless conduct;

(5) "Owner" means the possessor of a fee interest, a tenant, lessee, holder of a conservation easement as defined in § 15-20-402, occupant, or person in control of the premises;

(6) "Public" and "person" includes the Young Men's Christian Association, Young Women's Christian Association, Boy Scouts of America, Girl Scouts of the United States of America, Boys and Girls Clubs of America, churches, religious organizations, fraternal organizations, and other similar organizations; and

(7) "Recreational purpose" includes, but is not limited to, any of the following or any combination thereof:

(A) Hunting;

(B) Fishing;

(C) Swimming;

(D) Boating;

(E) Camping;

(F) Picnicking;

(G) Hiking;

(H) Pleasure driving;

(I) Nature study;

(J) Water skiing;

(K) Winter sports;

- (L) Spelunking;
- (M) Aviation;
- (N) Viewing or enjoying historical, archeological, scenic, or scientific sites; and
- (O) Any other activity undertaken for exercise, education, relaxation, or pleasure on land owned by another.

History. Acts 1965, No. 51, § 2; 1983, No. 168, §§ 1, 2; 1985, No. 959, § 1; A.S.A. 1947, § 50-1102; Acts 1991, No. 485, § 1; 2007, No. 677, § 1; 2013, No. 84, § 1; 2015, No. 1112, § 1.

A.C.R.C. Notes. Acts 2015, No. 1112, § 2, provided: "Applicability.

"(a) This act applies to all causes of action that accrue on or after the effective date of this act.

"(b) This act does not apply retroactively to an action filed or a cause of action

that accrued before the effective date of this act."

Amendments. The 2013 amendment inserted (1) and redesignated the remaining subdivisions accordingly; inserted "airstrips" in present (3); and inserted present (6)(M) [now (7)(M)] and redesignated the remaining subdivisions accordingly.

The 2015 amendment added the definition for "Malicious".

CASE NOTES

Charge.

Revenue from a business enterprise adjacent to a recreational site does not constitute a "charge" as used in this section.

Carlton ex rel. Carlton v. Cleburne County, 93 F.3d 505 (8th Cir. 1996).

Cited: Mandel v. United States, 793 F.2d 964 (8th Cir. 1986).

18-11-303. Construction.

Nothing in this subchapter shall be construed to:

- (1) Create a duty of care or ground of liability for injury to persons or property; or
- (2) Relieve any person using the land of another for recreational purposes from any obligation which he or she may have in the absence of this subchapter to exercise care in his or her use of the land and in his or her activities thereon or relieve any person from the legal consequences of failure to employ such care.

History. Acts 1965, No. 51, § 7; A.S.A. 1947, § 50-1107.

18-11-304. Duty of care.

Except as specifically recognized by or provided in § 18-11-307, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on the premises to persons entering for recreational purposes.

History. Acts 1965, No. 51, § 3; A.S.A. 1947, § 50-1103.

CASE NOTES

Cited: *Roten v. United States*, 850 F. Supp. 786 (W.D. Ark.); *Carlton v. Cleburne County*, 93 F.3d 505 (8th Cir. 1996).

18-11-305. Owner's immunity from liability.

Except as specifically recognized by or provided in § 18-11-307, an owner of land who, either directly or indirectly, invites or permits without charge any person to use his or her property for recreational purposes does not thereby:

(1) Extend any assurance that the lands or premises are safe for any purpose;

(2) Confer upon the person the legal status of an invitee or licensee to whom a duty of care is owed;

(3) Assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons; or

(4) Assume responsibility for or incur liability for injury to the person or property caused by any natural or artificial condition, structure, or personal property on the land.

History. Acts 1965, No. 51, § 4; 1983, No. 168, § 3; A.S.A. 1947, § 50-1104.

CASE NOTES

ANALYSIS

Federal Government.
Lakes.

Federal Government.

The tort liability of the United States for personal injuries sustained by a person in a swimming hole in a national park is limited by this subchapter to the same extent as the liability of a private person.

Mandel v. United States, 719 F.2d 963 (8th Cir. 1983).

Lakes.

This section applied to an owner of a lake, who is an "owner of land" as used in this section. *Jenkins v. Arkansas Power & Light Co.*, 140 F.3d 1161 (8th Cir. 1998).

Cited: *Lively v. Libbey Mem'l Physical Medical Ctr.*, 311 Ark. 41, 841 S.W.2d 609 (1992).

18-11-306. Land leased to state or political subdivision — Conservation easement.

Unless otherwise agreed in writing, the provisions of §§ 18-11-304 and 18-11-305 are applicable to the duties and liability of:

(1) An owner of land leased to the state or a political subdivision of the state for recreational purposes;

(2) An owner of an interest in the real property burdened by a conservation easement as defined in § 15-20-402; or

(3) A holder of a conservation easement as defined in § 15-20-402.

History. Acts 1965, No. 51, § 5; A.S.A. 1947, § 50-1105; Acts 2007, No. 677, § 2.

18-11-307. Exceptions to owner's immunity.

Nothing in this subchapter limits in any way liability which otherwise exists:

(1) For malicious, but not mere negligent, failure to guard or warn against an ultra-hazardous condition, structure, personal property, use, or activity actually known to the owner to be dangerous; and

(2) For injury suffered in any case in which the owner of land charges the person or persons who enter or go on the land for the recreational use thereof, except that, in the case of land leased to the state, a subdivision thereof, or to a third person, any consideration received by the owner for the lease shall not be deemed a charge within the meaning of this section.

History. Acts 1965, No. 51, § 6; 1983, No. 168, § 4; A.S.A. 1947, § 50-1106.

RESEARCH REFERENCES

Ark. L. Rev. The Arkansas Recreational-Use Statute: Past, Present, and Future Application for Arkansas Land-

owners and Recreational Users of Land, 60 Ark. L. Rev. 849.

CASE NOTES

ANALYSIS

Applicability.
Failure to Warn.
Federal Government.
Immunity.
Malice.
Natural Phenomena.
Ultra-Hazardous Condition.

Applicability.

The changes from the previous provision (A.S.A. § 50-1106) to the current version of subdivision (1) of this section appear to indicate that: (1) mere negligent failure to warn or guard does not invoke the exception; (2) ultra-hazardous conditions, as opposed to mere dangerous conditions, structures, personal properties, uses or activities are required to invoke the exception; and (3) for invocation of the exception and resulting liability, the ultra-hazardous condition, structure, personal property, use, or activity must be actually known to the owner to be dangerous. *Rotten v. United States*, 850 F. Supp. 786 (W.D. Ark.), *aff'd* without op., 39 F.3d 1184 (8th Cir. 1994).

Failure to Warn.

Evidence held sufficient to create a genuine issue of material fact as to the willfulness or maliciousness of the United States in failing to guard or warn against a dangerous condition. *Mandel v. United States*, 719 F.2d 963 (8th Cir. 1983) (decision prior to 1983 amendment).

In suit where plaintiff-sightseers on a public swinging bridge were injured or killed when the bridge collapsed, in order for the plaintiffs to prove their claim under the exception provided by subdivision (1) of this section, plaintiffs were required to prove not only that the swinging bridge was an ultra-hazardous structure actually known by the defendants to be dangerous, but also that the defendants maliciously, not merely negligently, failed to warn the plaintiffs of the dangerous condition. *Carlton ex rel. Carlton v. Cleburne County*, 93 F.3d 505 (8th Cir. 1996).

Lake owner's failure to warn swimmers and boaters of a submerged island in an apparently deep area of water was negligent at most. *Jenkins v. Arkansas Power & Light Co.*, 140 F.3d 1161 (8th Cir. 1998).

Injured persons met their burden of proof under the Arkansas Recreational

Use Statute, § 18-11-301 et seq., by showing that the landowners maliciously failed to guard or warn against a known ultra-hazardous condition and, therefore, the landowners were not immune from liability to persons entering the landowners' property for recreational purposes, as provided in the immunity exception under subdivision (1) of this section. *Carr v. Nance*, 2010 Ark. 497, 370 S.W.3d 826 (2010).

Federal Government.

The tort liability of the United States for personal injuries sustained by a person in a swimming hole in a national park is limited by this subchapter to the same extent as the liability of a private person. *Mandel v. United States*, 719 F.2d 963 (8th Cir. 1983).

Defendant United States did not maliciously fail to guard or warn about high cliffs at White Rock so as to incur liability for decedent's death under the subdivision (1) exception of this section. *Roten v. United States*, 850 F. Supp. 786 (W.D. Ark.), *aff'd* without op., 39 F.3d 1184 (8th Cir. 1994).

Immunity.

Immunity under the Arkansas Recreational Use Statute, §§ 18-11-301 — 18-11-307, is in derogation of the common law, and any statute in derogation of the common law will be strictly construed. *Roeder v. United States*, 2014 Ark. 156, 432 S.W.3d 627 (2014).

Malice.

Malice is inferred where the negligent party knew, or had reason to believe, that his act of negligence was about to inflict injury, and that he continued on his course with a conscious indifference to the consequences. *Carlton ex rel. Carlton v. Cleburne County*, 93 F.3d 505 (8th Cir. 1996).

"Malicious" conduct includes conduct in reckless disregard of the consequences from which malice may be inferred; given that "malicious" was open to more than one construction, the statute was ambiguous, and "but not mere negligent" functioned as an explanatory phrase, and the legislature used those words to clarify

what type of malice had to be shown to preclude immunity from liability (decided prior to 2015 amendment). *Roeder v. United States*, 2014 Ark. 156, 432 S.W.3d 627 (2014).

Natural Phenomena.

Since the purpose of this subchapter is to encourage landowners (including the United States) to make areas available to the public for recreational purposes and thus limit their liability, it is reasonable to conclude that a condition or structure which is natural, such as high cliffs, should not be considered ultra-hazardous within the meaning of the exception to this subchapter in subdivision (1) of this section. *Roten v. United States*, 850 F. Supp. 786 (W.D. Ark.), *aff'd* without op., 39 F.3d 1184 (8th Cir. 1994).

The high cliff areas of White Rock Mountain, a natural phenomenon, should not be considered an ultra-hazardous condition as defined by the exception in subdivision (1) of this section. *Roten v. United States*, 850 F. Supp. 786 (W.D. Ark.), *aff'd* without op., 39 F.3d 1184 (8th Cir. 1994).

Ultra-Hazardous Condition.

Whereas the cliffs areas in White Rock Mountain, from which at least four people have fallen, posed an obvious danger, the collapse of the swinging bridge was an unforeseen occurrence. *Carlton ex rel. Carlton v. Cleburne County*, 93 F.3d 505 (8th Cir. 1996).

There is an obvious danger associated with diving into water at night when one has not tested the water to see how deep it is; therefore an unexpected shallow area cannot be considered an ultra-hazardous condition in and of itself which requires a warning. *Jenkins v. Arkansas Power & Light Co.*, 140 F.3d 1161 (8th Cir. 1998).

Where an all-terrain vehicle (ATV) rider was injured when the rider drove the ATV into a steel cable on the landowners' property, it was not the hanging of a cable per se that constituted the ultra-hazardous activity, but the hanging of an unmarked cable at a dangerous height in an area in which the landowners knew there were people traveling on ATVs. *Carr v. Nance*, 2010 Ark. 497, 370 S.W.3d 826 (2010).

SUBCHAPTER 4 — POSTED LAND

SECTION.

- 18-11-401. Purpose.
 18-11-402. Definition.
 18-11-403. Unlawful entry upon land — Penalty.
 18-11-404. Methods of posting — Forest lands.

SECTION.

- 18-11-405. Methods of posting — Property other than forest.
 18-11-406. Color of paint — Unlawful posting — Exception.

Publisher's Notes. Former subchapter 4, concerning posted land, was repealed by Acts 1989, No. 35, § 9. The former subchapter was derived from the following sources:

- 18-11-401. Acts 1985, No. 1090, § 6; A.S.A. 1947, §§ 41-2004n, 50-1102n — 50-1107n.
 18-11-402. Acts 1985, No. 1090, § 1; A.S.A. 1947, § 41-2060.

18-11-403. Acts 1985, No. 1090, § 3; A.S.A. 1947, § 41-2062.

18-11-404. Acts 1985, No. 1090, § 2; A.S.A. 1947, § 41-2061.

18-11-405. Acts 1985, No. 1090, §§ 4, 5; A.S.A. 1947, §§ 41-2063, 41-2064.

Cross References. Trespass on posted lands, § 5-39-301 et seq.

Unlawful to install or maintain booby traps, § 5-73-126.

RESEARCH REFERENCES

Ark. L. Notes. Brill, *Arkansas Law of Damages*, Fifth Edition, Chapter 30: Real Property, 2004 *Arkansas L. Notes* 9.

U. Ark. Little Rock L.J. Survey, Property, 12 *U. Ark. Little Rock L.J.* 659.

18-11-401. Purpose.

It is the intent and purpose of this subchapter to clarify the posting law of this state. However, this subchapter does not set forth the exclusive method by which a property owner or lessee may notify persons to not enter or remain upon their property, nor does this subchapter repeal or modify § 18-11-301 et seq., which limits the liability of landowners to persons gratuitously utilizing their property for recreational purposes, nor does this subchapter repeal or modify § 5-39-203 which is the provision of the Arkansas Criminal Code relating to trespass.

History. Acts 1989, No. 35, § 7.

Publisher's Notes. The Arkansas Criminal Code referred to in this section is codified throughout Title 5. See Publisher's Note to § 5-1-101.

Cross References. Criminal trespass, § 5-39-203.

Recreational uses — owner's liability, § 18-11-301 et seq.

18-11-402. Definition.

For the purposes of this subchapter, the term "recreational purposes" includes, but is not limited to, any of the following, or any combination thereof:

- (1) Hunting;
- (2) Fishing;
- (3) Trapping;
- (4) Swimming;
- (5) Boating;
- (6) Camping;
- (7) Picnicking;
- (8) Hiking;
- (9) Pleasure driving;
- (10) Nature study;
- (11) Water skiing;
- (12) Winter sports; and
- (13) Viewing or enjoying historical, archeological, scenic, or scientific sites.

History. Acts 1989, No. 35, § 1.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Legislative Survey, Criminal Law, 8 U. Ark. Little Rock L.J. 559.

18-11-403. Unlawful entry upon land — Penalty.

(a)(1) No person shall enter for recreational purposes upon real property posted pursuant to this subchapter without written permission of the owner or lessee of the real property.

(2) It shall be unlawful for any person to enter upon any real property posted under the provisions of this subchapter without the written consent of the owner or lessee of the real property.

(3)(A) If land posted pursuant to this subchapter becomes flooded above the ordinary high watermark but the signs or paint marks are still visible, it is unlawful for any person to enter within the boundaries of the posted area without the written consent of the owner or lessee of the real property.

(B) For purposes of subdivision (a)(3)(A) of this section, “ordinary high watermark” means the line delimiting the bed of a stream from its bank, i.e., that line at which the presence of water is continued for such length of time as to mark upon the soil and vegetation a distinct character.

(4) However, it shall be an affirmative defense to prosecution under this subchapter that:

(A) Consent was given by a person holding himself or herself out to be the owner, lessee, or agent of the owner or lessee of the property;

(B) The person was a guest or invitee;

(C) The person was required to enter upon the premises for business reasons or for health or safety reasons; or

(D) The person was authorized by law to enter upon land.

(b) This section shall not apply to a law enforcement officer in the line of duty.

(c) Any person who knowingly enters the real property without written consent shall be guilty of a Class B misdemeanor.

History. Acts 1989, No. 35, §§ 2, 6; 1997, No. 806, § 1; 1999, No. 1029, § 8.

Cross References. Fines, § 5-4-201. Imprisonment, § 5-4-401.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Seventeenth Annual Survey of Arkansas Law — Property, 17 U. Ark. Little Rock L.J. 453.

CASE NOTES

ANALYSIS

Construction.
Hunters.

Construction.

This section is a penal statute and therefore must be strictly construed, resolving any doubts in favor of the accused. *Nelson v. State*, 318 Ark. 146, 883 S.W.2d 839 (1994).

Hunters.

It is clear the legislature intended to include lessees of hunting rights in the class of persons referred to as “owner or lessee of the real property” in subsection (a) of this section. *Nelson v. State*, 318 Ark. 146, 883 S.W.2d 839 (1994).

18-11-404. Methods of posting — Forest lands.

The owner or lessee of any forest land may post the land by any of the following methods:

(1)(A) By placing signs around the boundaries of the property at points no more than one hundred feet (100') apart and at each point of entry.

(B) The signs shall bear the words “posted” or “no trespassing”, or both, in letters at least four inches (4”) high and shall be so placed as to be readily visible to any person approaching the property;

(2)(A) By placing identifying paint marks on trees or posts around the area to be posted.

(B) Each paint mark shall be a vertical line of at least eight inches (8”) in length and the bottom of the mark shall be no less than three feet (3') nor more than five feet (5') high.

(C) Such paint marks shall be placed no more than one hundred feet (100') apart and shall be readily visible to any person approaching the property.

(D)(i) The type and color of the paint to be used for posting shall be prescribed by regulation by the Arkansas Forestry Commission.

(ii) The commission shall not select a color that is presently being used by the timber industry in Arkansas to mark land lines or property lines; or

(3) By enclosing the property with a fence sufficient under § 2-39-101 et seq.

History. Acts 1989, No. 35, § 3; 1999, No. 1029, § 9.

18-11-405. Methods of posting — Property other than forest.

The owner or lessee of any real property other than forest land, including cultivated land, orchards, pasture land, impoundments, or other real property, may post such real property by any of the following methods:

(1)(A) By placing signs around the boundaries of the property at points no more than one thousand feet (1,000') apart and at each point of entry.

(B) The signs shall bear the words "posted" or "no trespassing", or both, in letters at least four inches (4") high and shall be so placed as to be readily visible to any person approaching the property;

(2)(A) By placing identifying paint marks on posts around the area to be posted.

(B) Each paint mark shall be a vertical line of at least eight inches (8") inches in length, and the bottom of the mark shall be no less than three feet (3') nor more than five feet (5') high.

(C) Such paint marks shall be placed no more than one thousand feet (1,000') apart and at each point of entry and shall be readily visible to any person approaching the property.

(D)(i) The type and color of the paint to be used for posting shall be prescribed by regulation by the Arkansas Forestry Commission.

(ii) The commission shall not select a color that is presently being used by the timber industry in Arkansas to mark land lines or property lines; or

(3) By enclosing the property with a fence sufficient under § 2-39-101 et seq.

History. Acts 1989, No. 35, § 3; 1999, No. 1029, § 10.

18-11-406. Color of paint — Unlawful posting — Exception.

(a)(1) The color of paint prescribed by the Arkansas Forestry Commission for posting purposes shall not be used on trees or posts for any other purpose.

(2) Any person who knowingly paints such color on any tree or post for any purpose other than posting real property pursuant to this subchapter shall be guilty of a Class B misdemeanor.

(b)(1) It shall be unlawful for any person to post any lands which the person does not own or lease except with the written permission of the owner or lessee.

(2) Any person violating this section shall be guilty of a Class B misdemeanor.

History. Acts 1989, No. 35, §§ 4, 5; 2011, No. 271, § 1.

Amendments. The 2011 amendment substituted “Arkansas” for “State” in (a)(1).

Cross References. Fines, § 5-4-201. Imprisonment, § 5-4-401.

SUBCHAPTER 5 — RESIDENTIAL RESTRICTIVE COVENANTS

SECTION.

18-11-501. Discretionary enforcement of residential restrictive covenants.

SECTION.

18-11-502. Attorney’s fees.

18-11-503. Applicability of subchapter.

Effective Dates. Acts 1999, No. 1380, § 7: Apr. 13, 1999. Emergency clause provided: “It is hereby found and determined by the Eighty-second General Assembly that there is an immediate and urgent need for revision of the current state law concerning enforcement of interior setback restrictions in residential restrictive covenants. Recent court decisions appear to hold that any violation of such an interior setback restriction, no matter how slight, requires that the structure or part thereof built in violation of the setback restriction be removed. Such an interpretation of the law regarding interior setback restrictions in residential restrictive covenants will result in the needless destruction of property, with resultant

displacement of homeowners and their families and substantial expenditures to correct setback restriction violations which, in actuality, cause little or no damage to adjacent land owners. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto.”

18-11-501. Discretionary enforcement of residential restrictive covenants.

Circuit judges are authorized to exercise their discretion to balance the equities between or among parties when considering whether to award injunctions or damages in cases involving encroachment of interior setback lines in residential subdivision restrictive covenants.

History. Acts 1999, No. 1380, § 1.

18-11-502. Attorney’s fees.

If the trial judge makes a finding that the violation of an interior setback restriction is de minimis, no attorney’s fees shall be awarded to any party seeking to enforce the setback restriction.

History. Acts 1999, No. 1380, § 2.

18-11-503. Applicability of subchapter.

The provisions of this subchapter shall apply to cases currently pending in the courts of Arkansas as well as those filed subsequent to April 13, 1999.

History. Acts 1999, No. 1380, § 3.

SUBCHAPTER 6 — MUNICIPAL WATER SUPPLY PURPOSES — OWNER'S IMMUNITY

SECTION.

- 18-11-601. Purpose.
- 18-11-602. Definitions.
- 18-11-603. Construction.
- 18-11-604. Duty of care.
- 18-11-605. Owner's immunity from liability.

SECTION.

- 18-11-606. Land leased to municipality.
- 18-11-607. Exceptions to owner's immunity.

Effective Dates. Acts 2005, No. 1977, § 2: Apr. 11, 2005. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that there is nothing currently in the law that grants immunity from liability to persons who make property available for municipal water supply purposes; that this act provides sound public policy for the State of Arkansas; and that this act is immediately necessary because the state should encourage property owners to make property available for municipal

water supply purposes. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

18-11-601. Purpose.

The purpose of this subchapter is to encourage owners of land to make land and water areas available to municipal governments for municipal water supply purposes by limiting the liability of landowners toward persons entering on the land and water areas.

History. Acts 2005, No. 1977, § 1.

18-11-602. Definitions.

As used in this subchapter:

- (1) "Land" means real property, roads, water, watercourses, private ways, and buildings, structures, and machinery or equipment when attached to the real property;
- (2) "Municipal water supply purpose" includes, but is not limited to, any of the following, separately or in any combination:

- (A) Construction or maintenance of a water intake structure;
- (B) Maintenance of a water intake source;
- (C) Research concerning a water intake source or structure; and
- (D) Other activity associated with a water intake source or structure; and

(3) "Owner" means the possessor of a fee interest or a tenant, lessee, occupant, or person in control of the land.

History. Acts 2005, No. 1977, § 1.

18-11-603. Construction.

Nothing in this subchapter shall be construed to:

(1) Create a duty of care or a basis for liability for injury to persons or property; or

(2) Relieve any person using the land of another for a municipal water supply purpose from any obligation that he or she may have in the absence of this subchapter to exercise care in his or her use of the land and in his or her activities on the land or relieve any person from the legal consequences of failure to employ such care.

History. Acts 2005, No. 1977, § 1.

18-11-604. Duty of care.

Except as specifically provided in § 18-11-607, an owner owes no duty of care to:

(1) Keep his or her land safe for entry or use by another for a municipal water supply purpose; or

(2) Give any warning of a dangerous condition, use, structure, or activity on his or her land to a person entering for a municipal water supply purpose.

History. Acts 2005, No. 1977, § 1.

18-11-605. Owner's immunity from liability.

Except as specifically provided in § 18-11-607, an owner who, either directly or indirectly, invites or permits any person to use his or her land for a municipal water supply purpose does not:

(1) Extend any assurance that the land is safe for any purpose;

(2) Confer upon the person the legal status of an invitee or licensee to whom a duty of care is owed;

(3) Assume responsibility for or incur liability for any injury to person or property caused by an act or omission of the person; or

(4) Assume responsibility for or incur liability for injury to the person or property caused by any natural or artificial condition, structure, or personal property on the land.

History. Acts 2005, No. 1977, § 1.

18-11-606. Land leased to municipality.

Unless otherwise agreed to in writing, the provisions of §§ 18-11-604 and 18-11-605 shall be deemed the sole source of the duties and liability of an owner who leased or otherwise provided land to a municipality for a municipal water supply purpose.

History. Acts 2005, No. 1977, § 1.

18-11-607. Exceptions to owner's immunity.

Nothing in this subchapter limits in any way liability that otherwise exists for malicious, but not mere negligent, failure to guard or warn against an ultra-hazardous condition, structure, personal property, use, or activity actually known to the owner to be dangerous.

History. Acts 2005, No. 1977, § 1.

CHAPTER 12

CONVEYANCES

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. ACKNOWLEDGMENT AND PROOF OF INSTRUMENTS.
3. FEE TAIL.
4. HUSBAND AND WIFE.
5. POWER OF ATTORNEY.
6. MISCELLANEOUS CONVEYANCES.
7. DISBURSEMENT OF FUNDS AS PART OF REAL ESTATE CLOSING AND SETTLEMENT SERVICES ACT.

RESEARCH REFERENCES

Ark. L. Rev. Transmissibility of Certain Contingent Future Interests, 5 Ark. L. Rev. 111.

Drafting Instruments for Purchase and Conveyancing of Land, 13 Ark. L. Rev. 26.

The New Arkansas Inheritance Laws: A Step into the Present with an Eye to the Future, 23 Ark. L. Rev. 313.

Note, Deeds Reserving a Life Estate in the Grantor: Arkansas' Special Delivery Rules — Grimmett v. Estate of Beasley, 44 Ark. L. Rev. 219.

U. Ark. Little Rock L.J. Cathey, The Real Estate Installment Sale Contract: Its Drafting, Use, Enforcement, and Consequences, 5 U. Ark. Little Rock L.J. 229.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 18-12-101. Definition and applicability.
- 18-12-102. Transfer by deed — Warranty.
- 18-12-103. Restrictive covenants — Definition.

SECTION.

- 18-12-104. Execution of deeds.
- 18-12-105. Estate of fee simple presumed.
- 18-12-106. Joint tenants with right of

SECTION.

survivorship.

18-12-107. Transfer fee covenants prohibited — Definitions.

SECTION.

18-12-108. Scrivener's affidavits — Definition.

Cross References. Deeds recorded in recorder's office, § 14-15-401 et seq.
Records where multiple judicial districts, § 14-15-901.
Validation of deeds, § 16-47-108.

Effective Dates. Acts 1917, No. 332, § 2: Mar. 24, 1917. Emergency declared.

RESEARCH REFERENCES

Ark. L. Notes. Circo, Why is This Boilerplate in My Real Estate Contract?, 2005 Arkansas L. Notes 1.

18-12-101. Definition and applicability.

(a) The term "real estate" as used in this act shall be construed as co-extensive in meaning with "lands, tenements, and hereditaments" and as embracing all chattels real.

(b) This act shall not be construed so as to embrace last wills and testaments.

History. Rev. Stat., ch. 31, §§ 7, 8; C. & M. Dig., §§ 1501, 1502; Pope's Dig., §§ 1810, 1811; A.S.A. 1947, §§ 50-409, 50-410.

Meaning of "this act". Rev. Stat., ch. 31, codified as §§ 16-47-101, 16-47-103 —

16-47-106, 16-47-110, 18-12-101, 18-12-102, 18-12-104, 18-12-105, 18-12-201, 18-12-203 — 18-12-206, 18-12-209, 18-12-301, 18-12-402, 18-12-501, 18-12-502, 18-12-601 — 18-12-603.

CASE NOTES

Construction.

This section has been construed to mean that Rev. Stat., ch. 31 shall not be interpreted to include last wills and testa-

ments in any section in which they are not mentioned. *Mercantile Trust Co. v. Adams*, 95 Ark. 333, 129 S.W. 1101 (1910).

18-12-102. Transfer by deed — Warranty.

(a) All lands, tenements, and hereditaments may be aliened and possession thereof transferred by deed without livery of seizin.

(b) The words, "grant, bargain and sell" shall be an express covenant to the grantee, his or her heirs, and assigns that the grantor is seized of an indefeasible estate in fee simple, free from encumbrance done or suffered from the grantor, except rents or services that may be expressly reserved by the deed, as also for the quiet enjoyment thereof against the grantor, his or her heirs, and assigns and from the claim

and demand of all other persons whatever, unless limited by express words in the deed.

(c) The grantee, his or her heirs, or assigns, may, in any action, assign breaches as if such covenants were expressly inserted.

(d) As between the grantor and grantee, neither the statutory nor general express covenant of warranty against encumbrances shall be held to cover any taxes or assessments of any improvement district of any kind, whether formed under general statutes authorizing the assessment of lands for local improvements of any kind or whether the improvement district is formed by public or private act of the General Assembly. The lien for any such local assessment or tax shall run with the land and be assumed by the grantee, and the grantee shall pay any and all installments of the tax or assessment becoming due after the execution and delivery of the deed, unless otherwise expressly provided.

History. Rev. Stat., ch. 31, §§ 1, 2; Acts §§ 1495, 1496; Pope's Dig., §§ 1795, 1796; 1917, No. 332, § 1, p. 1671; C. & M. Dig., A.S.A. 1947, §§ 50-401, 50-402.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey — Property, 11 U. Ark. Little Rock L.J. 243.

U. Ark. Little Rock L. Rev. Lynn Foster & J. Cliff McKinney, II, Deed Cov-

enants of Title and the Preparation of Deeds: Theory, Law, and Practice in Arkansas, 34 U. Ark. Little Rock L. Rev. 53 (2011).

CASE NOTES

ANALYSIS

Covenants.

—Attorney's Fees.

—Breach.

—Improvement District Assessments.

Minors.

Quitclaim.

Reservation of Rents or Services.

Words of Conveyance.

—Express Limitation.

Covenants.

A grantor of real estate is not responsible on the statutory covenant implied by the use of the words "grant, bargain and sell" for encumbrances other than those done or suffered by himself. *Winston v. Vaughan*, 22 Ark. 72 (1860).

Words "grant, bargain and sell" in a deed granting a life estate created a covenant or warranty that the grantor was seized of an indefeasible estate in fee simple. A trial court erred in granting summary judgment to defendants on the life estate grantee's claims for breach of warranty, estoppel by deed, and conversion, although defendants did not own the

property at the time they granted the life estate; defendants clearly made warranties to the grantee and should have been required to honor them. *Jackson v. Smith*, 2010 Ark. App. 681, 380 S.W.3d 443 (2010).

—Attorney's Fees.

Although the Supreme Court held in *O'Bar v. Hight*, 169 Ark. 1008, 277 S.W. 533 (1925), that a covenantee could not recover attorney's fees from the covenantor in an action for breach of warranty, the 1989 amendment to § 16-22-308 permitted a trial court to allow a reasonable attorney's fee to the prevailing party in an action for breach of contract. *Murchie v. Hinton*, 41 Ark. App. 84, 848 S.W.2d 436 (1993).

—Breach.

Grantees in a deed containing covenants against encumbrances, who permitted the land to be sold under prior liens against the grantor and procured a purchaser to protect their title, were permitted to recoup from the purchase money the amount expended in removing the

encumbrances but could not claim title in the purchaser to defeat recovery by the grantor of the residue of the purchase money. *Brodie v. Watkins*, 31 Ark. 319 (1876).

The grantor is not bound to defend against the subsequent confirmation of a tax sale for forfeiture at time of deed and may show in a suit against him on his warranty that the forfeiture and sale for taxes were void. *Lonergan v. Baber*, 59 Ark. 15, 26 S.W. 13 (1894).

An outstanding lease of part of the property conveyed will break the covenant against encumbrances as to the entire tract. *Crawford v. McDonald*, 84 Ark. 415, 106 S.W. 206 (1907).

A covenant for quiet enjoyment was broken where a title paramount to that of the grantee's was held valid in a suit against them to which their grantor was a party. *Gibbons v. Moore*, 98 Ark. 501, 136 S.W. 937 (1911).

Covenant of warranty is implied by this section and, in order to recover for breach of such covenant, an eviction, either actual or constructive, must be alleged and proven. *Bosnick v. Hill*, 292 Ark. 505, 731 S.W.2d 204 (1987).

Seisin is a covenant which is broken as soon as made, if grantor has not possession, right of possession, and complete title. Grantors were to pay costs and expenses reasonably incurred by grantees for their successful efforts in vindicating their rights under covenant of seisin given them by grantors. *Bosnick v. Hill*, 292 Ark. 505, 731 S.W.2d 204 (1987).

Where landowner was evicted from a portion of her lot by a temporary restraining order, which eviction continued until the conclusion of a final hearing, landowner was entitled to recoup litigation costs and expenses from the grantor for breach of covenant in successfully defending an adverse possession suit and recovering possession of the disputed portion of lot. *Murchie v. Hinton*, 41 Ark. App. 84, 848 S.W.2d 436 (1993).

—Improvement District Assessments.

A general covenant of warranty in a deed will not be held to cover an improvement assessment which became a lien upon the land subsequent to the execution of the deed. *Blakemore v. Covey*, 173 Ark. 722, 293 S.W. 39 (1929).

Minors.

The deed of an infant will pass his estate subject to disaffirmance after majority, but his covenants are void. *Bagley v. Fletcher*, 44 Ark. 153 (1884).

Quitclaim.

A quitclaim deed is a substantive mode of conveyance and is as effectual to carry all the right, title, interest, claim and estate of the grantor as a deed with full covenants, although the grantee has no possession of or prior interest in the land. *Bagley v. Fletcher*, 44 Ark. 153 (1884).

A deed using the words "bargain, sell and quitclaim" omitting the statutory words of warranty and containing no express covenant of warranty is a mere quitclaim deed, insufficient to convey after-acquired title. *Holmes v. Countiss*, 195 Ark. 1014, 115 S.W.2d 553 (1938).

Where words "convey and quitclaim" appeared in deed in addition to statutory words "grant, bargain, and sell," the deed was a quitclaim deed and not a conveyance in fee simple. *Chavis v. Hill*, 216 Ark. 136, 224 S.W.2d 808 (1949).

Reservation of Rents or Services.

A deed conveying the title of land in fee simple carries with it the right to collect the rents; and, unless the deed reserves the right in the grantor to collect and use the rents, these pass as a necessary incident with the land to the grantee. *McPherson v. Johnson*, 270 Ark. 926, 606 S.W.2d 613 (1980).

Where no mention was made of the rents as being a part of the consideration, no reservation of rents was made in either the sales contract or in the deed. *McPherson v. Johnson*, 270 Ark. 926, 606 S.W.2d 613 (1980).

Since rent is an interest in realty, it can be alienated by way of a mortgage to take effect immediately. *First Fed. Sav. v. City Nat'l Bank*, 87 B.R. 565 (W.D. Ark. 1988).

Words of Conveyance.

The words "grant, bargain and sell" employed in the assignment of a bond for title do not import (nor does the act of assignment imply) a covenant that the vendor will comply with his contract to convey, but merely that he is the owner of the bond for title, and to invest the assignee therewith. *Hazer v. Yost*, 54 Ark. 485, 16 S.W. 372 (1891).

Words to the effect that a certain party “was the absolute owner” are not words of conveyance and have no effect whatever to place title in him. *Griffith v. Ayer-Lord Tie Co.*, 109 Ark. 223, 159 S.W. 218 (1913).

In order to transfer title to standing timber, it is absolutely necessary that words “grant, bargain and sell,” or words of the same purport be expressed in the instrument. *Griffith v. Ayer-Lord Tie Co.*, 109 Ark. 223, 159 S.W. 218 (1913).

Words “bargain, sell and quitclaim,” as used in a deed, do not have the same import as “grant, bargain and sell” used in this section. *Holmes v. Countiss*, 195 Ark. 1014, 115 S.W.2d 553 (1938).

Mineral deed from 1929 effectively conveyed 100 percent of a mineral interest because the statutory language required an interpretation that there was a 100 percent conveyance, and the mineral deed contained no language that appeared to limit the conveyance. Moreover, alleged deficiencies contained in the 1929 deed did not overcome the grantors’ intent to convey 100 percent of the mineral interest, and 13 blank spaces did not undermine that intent. *Barton Land Servs. v. SEECO, Inc.*, 2013 Ark. 231, 428 S.W.3d 430 (2013).

—Express Limitation.

This section is inapplicable where the habendum clause contains a statement of claims against which title is warranted. *Doak v. Smith*, 137 Ark. 509, 208 S.W. 795 (1919).

If the word “quitclaim,” or any words other than statutory words “grant, bargain, and sell,” appear in the granting clause of the deed, then presence of such other words, if inconsistent with statutory words, will prevent conveyance from conveying title in fee simple. *Chavis v. Hill*, 216 Ark. 136, 224 S.W.2d 808 (1949).

Cited: *Stull v. Harris*, 51 Ark. 294, 11 S.W. 104 (1888); *Rogers v. Bollinger*, 59 Ark. 12, 26 S.W. 12 (1894); *Seldon v. Dudley E. Jones Co.*, 74 Ark. 348, 85 S.W. 778 (1905); *Beauchamp v. Bertig*, 90 Ark. 351, 119 S.W. 75 (1909); *Gibbons v. Moore*, 98 Ark. 501, 136 S.W. 937 (1911); *Graham v. Quarles*, 206 Ark. 542, 176 S.W.2d 703 (1944); *Jones v. Jones*, 236 Ark. 296, 365 S.W.2d 716 (1963); *Farmers Coop. Ass’n v. Webb*, 249 Ark. 277, 459 S.W.2d 815 (1970); *Abbott v. Pearson*, 257 Ark. 694, 520 S.W.2d 204 (1975); *Fetzer v. Bodcaw Co.*, 601 F.2d 356 (8th Cir. 1979); *Davis v. Griffin*, 298 Ark. 633, 770 S.W.2d 137 (1989).

18-12-103. Restrictive covenants — Definition.

(a) As used in this section, “restrictive covenant” means a restriction on the use or development of real property regardless of whether the restriction is created by a covenant in a deed or bill of assurance, or by any other instrument.

(b) An instrument creating a restrictive covenant is not effective to restrict the use or development of real property unless the instrument purporting to restrict the use or development of the real property is executed by the owners of the real property and recorded in the office of the recorder of the county in which the property is located.

(c) If the instrument creating a restrictive covenant contains separate sections stating the duration of the covenant and the requirements for amending the covenant, the section or sections stating the duration of the covenant shall be read independently of the section or sections stating the requirements for amending the covenant so that the duration of the covenant does not limit the ability to amend a restrictive covenant at any time.

History. Acts 1965, No. 395, § 1; A.S.A. 1947, § 50-427; Acts 2011, No. 185, § 2.

A.C.R.C. Notes. Acts 2011, No. 185, § 1, provided: “Findings and legislative

intent.

“(a) The General Assembly finds that:

“(1) The decision of the Arkansas Court of Appeals in *Rausch Coleman Homes*,

LLC v. Brech, 2009 Ark. App. 225, 303 S.W.3d 456 (Ark. App. 2009) unduly restricts the use and development of real property; and

“(2) It is in the best interests of the people of the State of Arkansas to foster the ability of landowners to amend private covenants to obtain the best possible use of the landowners’ real property.

“(b) It is the intent of the General Assembly by passing this act to encourage and promote the use and economic development of land in the State of Arkansas by clarifying the requirements for amending covenants restricting the use or development of real property.”

Amendments. The 2011 amendment rewrote the section.

RESEARCH REFERENCES

Ark. L. Rev. Judicial Handling of Restrictive Covenants in Arkansas Residential Subdivisions, 28 Ark. L. Rev. 245.

U. Ark. Little Rock L.J. Survey — Property, 12 U. Ark. Little Rock L.J. 225.

CASE NOTES

ANALYSIS

Enforcement.

Filing.

Owners of the Real Property.
Subdivisions.

Enforcement.

A restrictive covenant could not be enforced based solely on a general plan of development in the absence of restrictions in the grantee’s chain of title. *Knowles v. Anderson*, 307 Ark. 393, 821 S.W.2d 466 (1991).

Restrictive covenant prohibiting the subdividing of lots in phase one of a subdivision did not apply to appellees’ phase two property; there were no restrictions clearly applicable to phase two property and the ambiguity was resolved in favor of appellees and defeated the contention that the plat alone adopted phase one restrictions for phase two property. *Estes v. Merritt*, 96 Ark. App. 380, 242 S.W.3d 295 (2006).

Covenant limiting the use of each lot to a single family residence and incidental outbuildings was not void as an unreasonable restraint on alienation where the developer was aware of the conditions and requirements when it purchased the property and it failed to show that there had been a change in conditions sufficient to warrant invalidation of the covenant. *Royal Oaks Vista LLC v. Maddox*, 372 Ark. 119, 271 S.W.3d 479 (2008).

Filing.

Restrictive covenant could be enforced against one who took deed with knowledge of restriction even though developers had not filed a plat as required by this section. *Jones v. Cook*, 271 Ark. 870, 611 S.W.2d 506 (1981).

A bill of assurance which limited certain land uses was ineffective against second purchaser’s use of the land where, at the time the vendors filed the bill of assurance, they had already conveyed the property to the first purchaser even though the first purchaser subsequently conveyed the property back to the original vendor. *White v. Cordes*, 14 Ark. App. 104, 685 S.W.2d 524 (1985).

Owners of the Real Property.

The phrase “owners of the real property,” did not require mineral owners to join in the execution of bills of assurance before covenants could affect the use of real property. *McGuire v. Bell*, 297 Ark. 282, 761 S.W.2d 904 (1988).

Subdivisions.

Restrictive covenants pertaining to a subdivision were neither valid nor effective where only one of several property owners signed the restrictive covenants document. *Forrest Constr., Inc. v. Milam*, 345 Ark. 1, 43 S.W.3d 140 (2001).

Cited: *Ray v. Miller*, 323 Ark. 578, 916 S.W.2d 117 (1996).

18-12-104. Execution of deeds.

Deeds and instruments of writing for the conveyance of real estate shall be executed in the presence of two (2) disinterested witnesses or, in default thereof, shall be acknowledged by the grantor in the presence of two (2) such witnesses, who shall then subscribe the deed or instrument in writing for the conveyance of the real estate. When the witnesses do not subscribe the deed or instrument of writing as described in this section at the time of the execution thereof, the date of their subscribing it shall be stated with their signatures.

History. Rev. Stat., ch. 31, § 12; C. & M. Dig., § 1515; Pope's Dig., § 1824; A.S.A. 1947, § 50-417.

CASE NOTES**ANALYSIS**

Authentication.
Noncompliance.

Authentication.

A deed for lands executed not in the presence of witnesses, but acknowledged as required by law, is sufficient authentication; no subscribing witnesses are necessary where the execution is duly acknowledged. Another method of authenticating deeds and instruments for conveyance is by the testimony of one of the subscribing witnesses, when the deed must be executed in the presence of two witnesses or acknowledged by the grantor in their presence when executed before them. Either method is effectual. *Cocke v. Brogan*, 5 Ark. 693 (1844).

Noncompliance.

A deed without attesting witnesses or acknowledgment is good and will pass the legal title as between the parties. *Stirman v. Cravens*, 29 Ark. 548 (1874); *Jackson v. Allen*, 30 Ark. 110 (1875); *McSwain v. Criswell*, 213 Ark. 775, 213 S.W.2d 383 (1948).

A contract constituting an option to purchase signed by both parties thereto, but acknowledged by the optionee only, was not in compliance with this section and should not have been filed for record. *Carpenter v. Shannon Bros.*, 199 Ark. 449, 134 S.W.2d 6 (1939).

Cited: *Byers v. Engles*, 16 Ark. 543 (1855).

18-12-105. Estate of fee simple presumed.

The term "heirs", or other words of inheritance, shall not be necessary to create or convey an estate in fee simple, but all deeds shall be construed to convey a complete estate of inheritance in fee simple unless expressly limited by appropriate words in the deed.

History. Rev. Stat., ch. 31, § 3; C. & M. Dig., § 1497; Pope's Dig., § 1797; A.S.A. 1947, § 50-403.

RESEARCH REFERENCES

Ark. L. Rev. The Entailed Estate: Ferment for Reform in Arkansas, 19 Ark. L. Rev. 275.

Legislative and Judicial Dynamism in Arkansas: *Poisson v. d'Avril*, 22 Ark. L. Rev. 724.

CASE NOTES

ANALYSIS

Applicability.
 Absolute Deed.
 Express Limitation.
 Wills.

Applicability.

This section is limited to fee simple estates and has no applicability to the construction of an option. *Roemhild v. Jones*, 239 F.2d 492 (8th Cir. 1957).

Absolute Deed.

A deed absolute on its face cannot be shown by parol testimony to be in trust for benefit of grantor, in absence of fraud, accident or mistake, or fiduciary relationship existing between the parties. *Scogin v. Scogin*, 176 Ark. 1009, 4 S.W.2d 953 (1928).

Where a warranty deed was absolute on its face and contained no reservations by the grantors, the deed conveyed absolute title to the grantees and was not subject to modification by a simultaneously executed sales agreement. *Barnes v. Barnes*, 275 Ark. 117, 627 S.W.2d 552 (1982).

Express Limitation.

Where the granting clause conveys the land described to the grantee in fee simple, a proviso in the habendum clause limiting the estate conveyed in certain contingencies to a life estate is repugnant to the granting clause and void. *Carlee v. Ellsberry*, 82 Ark. 209, 101 S.W. 407 (1907).

If the granting clause contains no words of inheritance and the conveyance is not expressly stated to be in fee simple, a limitation in the habendum is not repugnant and declares the grantor's intention and will rebut any implication which would otherwise arise from the omission in the granting clause. *McDill v. Meyer*, 94 Ark. 615, 128 S.W. 364 (1910); *Fender v.*

Rogers, 185 Ark. 191, 46 S.W.2d 804 (1932).

A grant by deed from husband to wife which in the habendum limited the estate to the wife and her heirs by the grantor born of her body held to create a life estate in the wife. *Georgia State Sav. Ass'n v. Dearing*, 128 Ark. 149, 193 S.W. 512 (1917).

Where deed conveyed land to husband and wife, and "their heirs only forever," the word "only" was treated as surplusage, and they acquired an estate in fee simple absolute. *United States v. 48.9 Acres of Land*, 85 F. Supp. 133 (W.D. Ark. 1949).

Deed conveying land for a right-of-way held an easement and not a deed in fee simple where other conditions in deed indicated an easement was intended. *Daugherty v. Helena & Nw. Ry.*, 221 Ark. 101, 252 S.W.2d 546 (1952).

Mineral deed from 1929 effectively conveyed 100 percent of a mineral interest because the statutory language required an interpretation that there was a 100 percent conveyance, and the mineral deed contained no language that appeared to limit the conveyance. Moreover, alleged deficiencies contained in the 1929 deed did not overcome the grantors' intent to convey 100 percent of the mineral interest, and 13 blank spaces did not undermine that intent. *Barton Land Servs. v. SEECO, Inc.*, 2013 Ark. 231, 428 S.W.3d 430 (2013).

Wills.

Whenever an estate in lands is created by will, it will be deemed to be an estate in fee simple, if a lesser estate is not clearly indicated. *Ollar v. Roy*, 212 Ark. 682, 207 S.W.2d 313 (1948).

Cited: *Lanigan v. Sweany*, 53 Ark. 185, 13 S.W. 740 (1890); *Metropolitan Life Ins. Co. v. Gardner*, 245 Ark. 742, 434 S.W.2d 266 (1968); *Fetzer v. Bodcaw Co.*, 601 F.2d 356 (8th Cir. 1979).

18-12-106. Joint tenants with right of survivorship.

(a) Interests in real property may be conveyed to two (2) or more persons, regardless of their relationship to each other, as joint tenants with right of survivorship.

(b) Any person who owns an interest in real property may convey that interest or any portion thereof to himself or herself and one (1) or

more other persons, regardless of their relationship to each other, as joint tenants with right of survivorship.

(c) Furthermore, all conveyances of real property made prior to July 15, 1991, and which clearly intended that the interests were conveyed as joint tenancy with right of survivorship even though the grantees were not husband and wife shall be deemed to have created joint tenancies with right of survivorship.

History. Acts 1991, No. 56, § 1.

CASE NOTES

Survivorship Interest.

With respect to conveyances prior to July 15, 1991, subsection (c) of this section provides that a joint tenancy with right of survivorship was created if it was "clearly intended"; the question whether a survivorship interest was intended should be determined from the four corners of the deed. *Brissett v. Sykes*, 313 Ark. 515, 855 S.W.2d 330 (1993).

A deed which did not stop with describ-

ing the purchasers as husband and wife but went further and stated that they were to hold "as tenants by the entirety" was sufficient to establish a joint tenancy with right of survivorship; merely describing the purchasers as "husband and wife" was insufficient to establish an intent to create a survivorship interest. *Brissett v. Sykes*, 313 Ark. 515, 855 S.W.2d 330 (1993).

18-12-107. Transfer fee covenants prohibited — Definitions.

(a) As used in this section:

(1) "Association" means a nonprofit, mandatory-membership organization:

(A) Comprised of owners of homes, condominiums, units in a horizontal property regime, cooperatives, manufactured homes, or any other interest in real property; and

(B) Created pursuant to declaration, covenant, bill of assurance, master deed, or other applicable law;

(2) "Licensee" means a licensee as defined in § 17-42-103;

(3) "Transfer" means the sale, gift, grant, conveyance, assignment, inheritance, or other transfer of an ownership interest in real property located in this state;

(4)(A) "Transfer fee" means a fee or charge that obligates a transferee or transferor of real property to pay a fee or charge to a third person:

(i) Upon a transfer of an interest in the real property; or

(ii) For permitting the transfer.

(B) "Transfer fee" does not include a tax, assessment, fee, or charge imposed by a governmental authority under applicable law; and

(5)(A) "Transfer fee covenant" means a provision in a recorded document or an unrecorded document imposing a transfer fee that purports to run with the land or bind current owners or successors in title to real property located in this state.

(B) "Transfer fee covenant" includes a lien or claim of lien to secure payment of a transfer fee.

(C) "Transfer fee covenant" does not include a provision:

(i) Of a purchase contract, option, mortgage, security agreement, real property listing agreement, or other agreement that obligates a party to the agreement to pay another party to the agreement as full or partial consideration for the agreement or for a waiver of rights under the agreement an amount determined by the agreement if the amount is:

(a) Payable on a one-time basis only upon the next transfer of an interest in the specified real property and, once paid, shall not bind successors in title to the property;

(b) A loan assumption fee or other fee charged in connection with a transfer by a lender holding or obtaining a lien on the transferred real property; or

(c) A fee or commission paid to a licensee for services rendered in connection with a transfer of the property for which the fee or commission is paid;

(ii) In a deed, memorandum, or other document recorded for the purpose of providing record notice of an agreement described in subdivision (a)(5)(C)(i) of this section;

(iii) Of a document requiring payment of a fee or charge to an association to be used exclusively for the purposes authorized in the document, as long as no portion of the fee is required to be passed through to a third party designated or identifiable by description in the document or another document referenced in the document; or

(iv) Of a document affecting real property that requires payment of a fee or charge to an organization described in § 501(c)(3) or § 501(c)(4) of the Internal Revenue Code as it existed on January 1, 2011, to be used exclusively to support:

(a) Cultural, educational, charitable, recreational, environmental, conservational, or other similar activities benefiting the real property; or

(b) The community in which the property is located.

(b)(1) A transfer fee covenant recorded with respect to real property in this state after July 27, 2011:

(A) Does not run with the title to the real property; and

(B) Is not binding upon or enforceable at law or in equity against:

(i) The real property; or

(ii) A subsequent owner, purchaser, or mortgagee of an interest in the real property.

(2) This section does not validate a transfer fee covenant recorded in this state before July 27, 2011.

History. Acts 2011, No. 145, § 1.

U.S. Code. Sections 501(c)(3) and 501(c)(4) of the Internal Revenue, referred

to in this section, are codified as 26 U.S.C. § 501(c)(3) and (4).

18-12-108. Scrivener's affidavits — Definition.

(a) As used in this section, "scrivener's affidavit" means a sworn and acknowledged affidavit relating to:

(1) The identification, marital status, heirship, relation, death, or the time of death of a person who is a party to an instrument affecting the title to real property;

(2) The identification of a corporation or other legal entity that is a party to an instrument affecting the title to real property; or

(3) The legal description to real property.

(b) A scrivener's affidavit may be executed and recorded by a:

(1) Licensed attorney who prepared the original instrument;

(2) Licensed attorney who represents a party to the original instrument;

(3) Party to the original instrument if the party prepared the original instrument; or

(4) Current employee of a title company that completed the form of the original instrument.

(c) A scrivener's affidavit shall:

(1) Be sworn to and acknowledged before a person authorized to administer an oath under the laws of this state;

(2) Conspicuously identify in its title that it is a "Scrivener's Affidavit"; and

(3) Contain the following information concerning the original instrument:

(A) The name of the person or entity that completed or prepared the original instrument;

(B) The names of all parties to the original instrument;

(C) The recording information, including the recording date of the original instrument; and

(D) A brief description of each error that the scrivener's affidavit is designed to correct.

(d) A scrivener's affidavit may be prepared in substantially the following form:

"SCRIVENER'S ERROR AFFIDAVIT

KNOW ALL PERSONS BY THESE PRESENTS that:

 [Name] prepared or completed the form of a
 [Type of instrument] with regard to a conveyance from
 [Name(s)] as [grantor, mortgagor, etc.] to
 [Name(s)] as [grantee, mortgagee, etc.] . The
 [Type of instrument] which was recorded in the records of
 County, Arkansas, on [Date] , as Instrument Number
 [in Book at Page] contained a scrivener's error with regard
to the [reason for correction(s)] .

affidavit is effective at the time the original instrument being corrected was recorded.

(3) Subdivision (f)(2) of this section does not apply to a bona fide purchaser for value of real property.

History. Acts 2013, No. 1045, § 1.

SUBCHAPTER 2 — ACKNOWLEDGMENT AND PROOF OF INSTRUMENTS

SECTION.

- 18-12-201. Proof or acknowledgment as prerequisite to recording real estate conveyances.
- 18-12-202. Forms of acknowledgments — Validity — Acknowledgments of married persons.
- 18-12-203. Officers authorized to take proof or acknowledgment of real estate conveyances.
- 18-12-204. Attestation of acknowledgments.
- 18-12-205. Certificate of acknowledgment.

SECTION.

- 18-12-206. Manner of making acknowledgment — Proof of deed or instrument — Proof of identity of grantor or witness.
- 18-12-207. [Repealed.]
- 18-12-208. Defects.
- 18-12-209. Recorded deed or written instrument affecting real estate.

Publisher's Notes. This subchapter and § 16-47-201 et seq. provide alternative methods of taking acknowledgments; therefore, acknowledgments taken under either this subchapter or § 16-47-201 et seq. are valid. See *Rumph v. Lester Land Co.*, 205 Ark. 1147, 172 S.W.2d 916 (1943).

The provisions of this subchapter are also codified as §§ 16-47-101 — 16-47-108, 16-47-110.

Cross References. Uniform act constitutes an alternative method of taking acknowledgments, § 16-47-217.

Effective Dates. Acts 1874, No. 13, § 3: effective on passage.

Acts 1887, No. 91, § 2: effective on passage.

Acts 1899, No. 150, § 3: effective on passage.

Acts 1921, No. 233, § 2: effective on passage.

Acts 1923, No. 464, § 3: effective on passage.

Acts 1955, No. 101, § 5: Feb. 23, 1955. Emergency clause provided: "The General Assembly finds it to be a fact, and so declares, that many instruments contain defective acknowledgments due to errors in the preparation thereof, without fault upon the part of the person, firm or corpo-

ration so executing said instruments; that these defective acknowledgments hamper the sale of real estate throughout the State and retard the development of industries and other businesses in the State of Arkansas; that this Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared to exist and this Act shall be in full force and effect from and after its passage and approval."

Acts 1981, No. 714, § 75: Mar. 25, 1981. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that existing law relating to such matters as homestead, dower, curtesy, statutory allowances payable from a decedent's estate, and the right of a surviving spouse to take against the will of a decedent, do not in all circumstances provide for equal treatment between the sexes, that the constitutionality of such existing law has been drawn into question by decisions of the United States Supreme Court and the Arkansas Supreme Court, and that there is an urgent need to insure that the law provides equality in the property rights and interests of married persons. Therefore, an emergency is declared to exist, and this

act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

Acts 2013, No. 999, § 6: Apr. 8, 2013. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that many instruments affecting title to real estate are being found to not provide constructive notice because of defects in the certificates of acknowledgment; and that this act is immediately necessary to protect property

rights and interests. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

RESEARCH REFERENCES

Am. Jur. 1 Am. Jur. 2d, Acknowl., § 1 et seq.

Ark. L. Notes. Atkinson, Laurence, The Avoidance by an Arkansas Bankruptcy Trustee of a Mortgage Defectively Acknowledged, 2003 Arkansas L. Notes 1.

Ark. L. Rev. Drafting Instruments for Purchase and Conveyancing of Land, 13 Ark. L. Rev. 26.

C.J.S. 1A C.J.S., Acknowl., § 1 et seq.

18-12-201. Proof or acknowledgment as prerequisite to recording real estate conveyances.

All deeds and other instruments in writing for the conveyance of any real estate, or by which any real estate may be affected in law or equity, shall be proven or duly acknowledged in conformity with the provisions of this act before they or any of them shall be admitted to record.

History. Rev. Stat., ch. 31, § 22; C. & M. Dig., § 1525; Pope's Dig., § 1835; A.S.A. 1947, § 49-211.

Publisher's Notes. Rev. Stat., ch. 31, § 22, is also codified as § 16-47-101.

Meaning of "this act". Rev. Stat., ch.

31, codified as §§ 16-47-101, 16-47-103 — 16-47-106, 16-47-110, 18-12-101, 18-12-102, 18-12-104, 18-12-105, 18-12-201, 18-12-203 — 18-12-206, 18-12-209, 18-12-301, 18-12-402, 18-12-501, 18-12-502, 18-12-601 — 18-12-603.

CASE NOTES

ANALYSIS

Contract of Sale.
Lease.
Mortgage.

Contract of Sale.

Recorded contract did not constitute constructive notice where it was not properly acknowledged. *Wyatt v. Miller*, 255 Ark. 304, 500 S.W.2d 590 (1973).

Where neither the offer and acceptance nor the purchaser's agreement were acknowledged, they were not recordable and

therefore the purchasers of the realty were without means of giving record notice to the world of their equitable interest in the property. *Sorrells v. Bailey Cattle Co.*, 268 Ark. 800, 595 S.W.2d 950 (Ct. App. 1980).

Lease.

A recorded lease which was not acknowledged would not be constructive notice; however the fact that it was recorded might be considered in determining whether the purchaser had actual notice before purchasing. *Prince v. Alford*, 173 Ark. 633, 293 S.W. 36 (1927).

Unacknowledged lease was not valid against purchasers who had no actual knowledge of the lease and could not be charged with constructive notice. *George v. George*, 267 Ark. 823, 591 S.W.2d 655 (Ct. App. 1979).

is of no validity. *Moore v. Ollson*, 105 Ark. 241, 150 S.W. 1028 (1912).

Cited: *In re Bearhouse, Inc.*, 99 B.R. 926 (Bankr. W.D. Ark. 1989).

Mortgage.

Unacknowledged mortgage is not entitled to record, and if recorded, its record

18-12-202. Forms of acknowledgments — Validity — Acknowledgments of married persons.

(a)(1) Either the forms of acknowledgments now in use in this state or any other forms may be used in the case of all deeds and other instruments in writing for the conveyance of real or personal property which:

(A) Specify, in the caption or otherwise, the state and county or other place where the acknowledgment is taken;

(B) Set out the name of the person acknowledging and, in instances in which he or she acknowledges otherwise than in his or her own right, the name of the person, association, or corporation for which he or she acknowledges; and

(C) Recite in substance or the equivalent that the execution of the instrument was acknowledged by the person so named as acknowledging, or any other form of acknowledgment provided by law.

(2) These forms may also be used when the property is to be affected in law or equity and also in any other case in which such an acknowledgment is for any purpose required or authorized by law.

(3) An acknowledgment in any of these forms shall be sufficient to entitle the instrument to be recorded and to be read in evidence.

(b) The acknowledgment of a married person, both as to the disposition of his or her own property and as to the relinquishment of dower, curtesy, and homestead in the property of a spouse, may be made in the same form as if that person were sole and without any examination separate and apart from a spouse, and without necessity for a specific reference therein to the interest so conveyed or relinquished.

History. Acts 1937, No. 44, § 1; Pope's Dig., § 1831; Acts 1981, No. 714, § 3; A.S.A. 1947, § 49-201.

CASE NOTES

In General.

This section is prospective in its operation. *Jackson v. Hudspeth*, 208 Ark. 55, 184 S.W.2d 906 (1945).

Cited: *Upshaw v. Wilson*, 222 Ark. 78, 257 S.W.2d 279 (1953); *George v. George*, 267 Ark. 823, 591 S.W.2d 655 (Ct. App. 1979).

18-12-203. Officers authorized to take proof or acknowledgment of real estate conveyances.

(a) The proof or acknowledgment of every deed or instrument of writing for the conveyance of any real estate shall be taken by one (1) of the following courts or officers:

(1) When acknowledged or proved within this state, before the Supreme Court, the circuit court, or any justices or judges thereof, the clerk of any court of record, any county judge, or before any notary public;

(2) When acknowledged or proved outside this state, and within the United States or its territories, or in any of the colonies or possessions or dependencies of the United States, before any court of the United States, or any state or territory, or colony or possession or dependency of the United States, having a seal, or a clerk of any such court, or before any notary public, or before the mayor of any incorporated city or town, or the chief officer of any city or town having a seal, or before a commissioner appointed by the Governor; and

(3) When acknowledged or proved outside the United States, before any:

(A) Court of any state, kingdom, or empire having a seal;

(B) Mayor or chief officer of any city or town having an official seal;

or

(C) Officer of any foreign country who by the laws of that country is authorized to take probate of the conveyance of real estate of his or her own country if the officer has, by law, an official seal.

(b) The acknowledgment of any deed or mortgage, when taken outside the United States, may be taken and certified by a United States consul.

History. Rev. Stat., ch. 31, § 13; Acts 1874, No. 13, § 1, p. 58; 1887, No. 91, § 1, p. 142; 1897, No. 26, § 1, p. 33; 1899, No. 150, § 1, p. 276; C. & M. Dig., § 1516; Acts 1921, No. 233, § 1; 1923, No. 464, §§ 1, 2; Pope's Dig., § 1825; A.S.A. 1947, §§ 49-202, 49-203; Acts 2003, No. 1185, § 252.

Publisher's Notes. As to validation of

prior acknowledgments, see Acts 1873, No. 36, § 2; Acts 1874, No. 13, § 2; Acts 1897, No. 26, § 2; Acts 1899, No. 150, § 2.

Rev. Stat., ch. 31, § 13, as amended, is also codified as § 16-47-103.

Cross References. Commissioners in other states may take acknowledgments, § 25-16-204.

CASE NOTES

ANALYSIS

Interested Parties.

Judge or Justice.

Out-of-State Acknowledgment.

Uniform Acknowledgment Act.

Interested Parties.

An acknowledgment taken by an officer who was a party to the deed does not

entitle the instrument to record, and a record of it will impart no notice to subsequent purchasers or encumbrancers; however, the defect may be cured by a proper curative statute. *Green v. Abraham*, 43 Ark. 420 (1884).

A notary public is not disqualified to take an acknowledgment to a mortgage by reason of the fact that he had acted as agent for the mortgagor in obtaining the

loan of money which the mortgage was intended to secure. *Penn v. Garvin*, 56 Ark. 511, 20 S.W. 410 (1892).

A surety on a note secured by a mortgage has such an interest therein which will disqualify him from taking the mortgagor's acknowledgment. *Leonhard v. Flood*, 68 Ark. 162, 56 S.W. 781 (1900).

Judge or Justice.

The acknowledgment of a deed was valid if taken before a judge or justice of the peace, within the limits of the state in which he was commissioned to act, regardless of the county in which the acknowledgment was taken. *Biscoe v. Byrd*,

15 Ark. 655 (1855) (decision under prior law).

Out-of-State Acknowledgment.

An acknowledgment taken by a justice of the peace or chairman of a county court of another state is invalid. *Worsham v. Freeman*, 34 Ark. 55 (1879).

Uniform Acknowledgment Act.

This section was not superseded by § 16-47-201 et seq., as those sections merely provide an alternative law on the subject of acknowledgments. *Rumph v. Lester Land Co.*, 205 Ark. 1147, 172 S.W.2d 916 (1943).

18-12-204. Attestation of acknowledgments.

(a) In cases of acknowledgment or proof of deeds or conveyances of real estate taken within the United States or territories thereof, when taken before any court or officer having a seal of office, the deed or conveyance shall be attested under the seal of office. If the officer has no seal of office, then it shall be attested under the official signature of the officer.

(b) In all cases of deeds and conveyances proved or acknowledged outside the United States or their territories, the acknowledgment or proof must be attested under the official seal of the court or officer before whom the probate is had.

History. Rev. Stat., ch. 31, §§ 14, 15; C. & M. Dig., §§ 1517, 1518; Pope's Dig., §§ 1826, 1827; A.S.A. 1947, §§ 49-204, 49-205.

Publisher's Notes. Rev. Stat., ch. 31, §§ 14 and 15, are also codified as § 16-47-104.

CASE NOTES

ANALYSIS

Out-of-State Court.
Seal.

Out-of-State Court.

Acknowledgment before a county court of another state must be authenticated by

the seal of the court. *Worsham v. Freeman*, 34 Ark. 55 (1879).

Seal.

When an acknowledgment is taken before an officer having an official seal, it should be authenticated by such seal. *Little v. Dodge*, 32 Ark. 453 (1877).

18-12-205. Certificate of acknowledgment.

(a) Any court or officer that takes a proof or an acknowledgment of any instrument affecting real property shall grant a certificate of the proof or acknowledgment.

(b) The court or officer shall cause the certificate of the proof or acknowledgment to be endorsed on the instrument affecting real property.

(c) The certificate of the proof or acknowledgment shall be signed by the clerk of the court or by the officer if he or she has a seal of office.

History. Rev. Stat., ch. 31, § 16; C. & M. Dig., § 1519; Pope's Dig., § 1828; A.S.A. 1947, § 49-206; Acts 2007, No. 827, § 142.

Publisher's Notes. Rev. Stat., ch. 31, § 16, is also codified as § 16-47-105.

CASE NOTES

ANALYSIS

Certificate as Evidence.

Contents.

Seal.

Signature of Notary.

Certificate as Evidence.

The certificate of a clerk of a court of record of another state to the acknowledgment of the execution of a deed is admissible as evidence without attestation of his official character by the judge of the court. *Ferguson v. Peden*, 33 Ark. 150 (1878).

Where there is in fact an appearance and acknowledgment of a deed in some manner, then the official certificate of acknowledgment is conclusive of every fact appearing on its face, and evidence of what passed at the time of the acknowledgment is inadmissible to impeach the certificate, except in case of fraud or imposition in obtaining the acknowledgment, and where knowledge or notice of the fraud or imposition is brought home to the grantee. *Holt v. Moore*, 37 Ark. 145 (1881); *Meyer v. Gossett*, 38 Ark. 377 (1882).

Contents.

It is not sufficient for the officer to certify in general terms that the deed was proved; it should appear from the certificate that the witness was sworn, and that he stated that the party whose name appears to the deed signed it, or executed it, or acknowledged that he had done so, or some such language amounting to proof of the execution of the deed. And it must appear that such proof was made by one of the attesting witnesses, unless it is made to appear that the subscribing witnesses are dead or cannot be had. *Trammell v. Thurmond*, 17 Ark. 203 (1856).

Seal.

The absence from a notary's seal of the emblems and devices required by the statute does not invalidate his certificate of the acknowledgment of a deed. *Sonfield v. Thompson*, 42 Ark. 46 (1883).

Signature of Notary.

An acknowledgment to the execution of a deed of trust is invalid if the notary does not sign his name thereto, although he does affix the imprint of his official seal. *Davis v. Hale*, 114 Ark. 426, 170 S.W. 99 (1914).

18-12-206. Manner of making acknowledgment — Proof of deed or instrument — Proof of identity of grantor or witness.

(a) The acknowledgment of deeds and instruments of writing for the conveyance of real estate, or whereby such real estate is to be affected in law or equity, shall be by the grantor appearing in person before a court or officer having the authority by law to take the acknowledgment and stating that he or she had executed the deed or instrument for the consideration and purposes therein mentioned and set forth.

(b) When a deed or instrument referred to in subsection (a) of this section is to be proved, it shall be done by one (1) or more of the subscribing witnesses personally appearing before the proper court or officer and stating on oath that he or she saw the grantor subscribe the deed or instrument of writing or that the grantor acknowledged in his

or her presence that he or she had subscribed and executed the deed or instrument for the purposes and consideration therein mentioned, and that he or she had subscribed the deed or instrument as a witness at the request of the grantor.

(c) If any grantor has not acknowledged the execution of a deed or instrument referred to in subsection (a) of this section and the subscribing witnesses are dead or cannot be had, then the deed or instrument may be proved by the evidence of the handwriting of the grantor and of at least one (1) of the subscribing witnesses. This evidence shall consist of the deposition of two (2) or more disinterested persons, swearing to each signature.

(d)(1) When any grantor in any deed or instrument that conveys real estate or whereby any real estate may be affected in law or equity, or any witness to any like instrument, shall present himself or herself before any court or other officer for the purpose of acknowledging or proving the execution of the deed or instrument, if the grantor or witness shall be personally unknown to the court or officer, his or her identity and his or her being the person he or she purports to be on the face of such instrument of writing shall be proved to the court or officer.

(2) Proof may be made by witnesses known to the court or officer or by the affidavit of the grantor or witness if the court or officer shall be satisfied therewith. The proof or affidavit shall also be endorsed on the deed or instrument of writing.

History. Rev. Stat., ch. 31, §§ 17-20; C. & M. Dig., §§ 1520-1523; Pope's Dig., §§ 1829, 1830, 1832, 1833; A.S.A. 1947, §§ 49-207 — 49-210.

Publisher's Notes. Rev. Stat. ch. 31, §§ 17-20, are also codified as § 16-47-106.

RESEARCH REFERENCES

Ark. L. Rev. The Best Evidence Rule — A Rule Requiring The Production of A Writing to Prove The Writing's Contents, 14 Ark. L. Rev. 153.

Authentication and Identification, 27 Ark. L. Rev. 332.

CASE NOTES

ANALYSIS

Consideration and Purposes.
Curative Acts.
Proof of Handwriting.
Telephone Acknowledgments.
Witnesses.

Consideration and Purposes.

The acknowledgment must show that the deed was executed "for the consideration and purposes" therein expressed. The words "consideration" and "purposes" are both material, and if either is omitted, and no word of similar import is used, the

acknowledgment is insufficient. *Johnson v. Godden*, 33 Ark. 600 (1878); *Ford v. Burks*, 37 Ark. 91 (1881); *Drew County Bank & Trust Co. v. Sorben*, 181 Ark. 943, 28 S.W.2d 730 (1930); *Donham v. Davis*, 208 Ark. 824, 187 S.W.2d 722 (1945).

The word "uses" is not of similar import or substantially the same as the word "consideration" required by this section. *Martin v. O'Bannon*, 35 Ark. 62 (1879).

If the acknowledgment fails to state the consideration, the mortgage, although recorded, is void against subsequent purchasers, even with notice; however, it is good between the parties. *Conner v. Ab-*

bott, 35 Ark. 365 (1880); *Wright v. Graham*, 42 Ark. 140 (1883), overruled, *Sidway v. Lawson*, 58 Ark. 117, 23 S.W. 648 (1893).

The omission of the word "consideration" or words of similar import in the acknowledgment of a mortgage renders the record thereof no notice to third parties. *Atlas Supply Co. v. McAmis*, 185 Ark. 1168, 51 S.W.2d 982 (1932).

An acknowledgment to a mortgage that it was "executed for the consideration and premises hereinafter set forth" sufficiently complied with this section to entitle the mortgage to be recorded. *First Nat. Bank v. Meriwether Sand & Gravel Co.*, 188 Ark. 642, 67 S.W.2d 599 (1934).

Curative Acts.

An acknowledgment, valid in the state where made, but ineffectual at the time of recordation in Arkansas because of failure to use words required by this section, was cured by Acts 1935, No. 72 and Acts 1937, No. 352. *Jackson v. Hudspeth*, 208 Ark. 55, 184 S.W.2d 906 (1945).

Proof of Handwriting.

Where a deed was not properly acknowledged, this deficiency was not cured by the attempt after the grantor's death to authenticate the signature; therefore, this

instrument was not entitled to the weight given to a properly recorded deed. *Frazier v. Frazier*, 263 Ark. 768, 567 S.W.2d 629 (1978).

Telephone Acknowledgments.

Where the notary public who had acknowledged previous leases acknowledged renewal lease and who, upon receiving a telephone request from the lessor, testified that she knew the lessor and recognized her voice on the telephone when the lessor called to state that she had signed the lease, the notary's certificate of acknowledgment was regular on its face, and absent any finding of fraud or forgery, the telephone acknowledgment was valid. *Stallings v. Poteete*, 17 Ark. App. 62, 702 S.W.2d 831 (1986).

Witnesses.

Subsections (b) and (c) require that two witnesses to a signature on an instrument actually witness the signing of the instrument rather than testify as to the authenticity of the signature. *Frazier v. Frazier*, 263 Ark. 768, 567 S.W.2d 629 (1978).

Cited: *Security Bank v. Paul*, 268 Ark. 548, 594 S.W.2d 259 (Ct. App. 1980); *Brown & Root, Inc. v. Hempstead County Sand & Gravel, Inc.*, 767 F.2d 464 (8th Cir. 1985); *In re Bearhouse, Inc.*, 99 B.R. 926 (Bankr. W.D. Ark. 1989).

18-12-207. [Repealed.]

Publisher's Notes. This section, concerning acknowledgment by corporations, was repealed by Acts 2013, No. 999, § 1.

The section was derived from Acts 1919, No. 45, § 1; C. & M. Dig., § 1526; Pope's Dig., § 1836; A.S.A. 1947, § 49-212.

18-12-208. Defects.

(a) All deeds, conveyances, deeds of trust, mortgages, marriage contracts, and other instruments in writing affecting or purporting to affect the title to any real estate or personal property situated in this state, which have been recorded and which are defective or ineffectual because:

- (1) Of failure to comply with § 18-12-403;
- (2) The officer who certified the acknowledgment or acknowledgments to such instruments omitted any words required by law to be in the certificate or acknowledgments;
- (3) The officer failed or omitted to attach his or her seal to the certificate;
- (4) The officer attached to any such certificate a seal not bearing the words and devices required by law;

(5) The officer was a mayor of a city or an incorporated town in the State of Arkansas and as such was not authorized to certify to executions and acknowledgments to such instruments, or was the deputy of an official duly authorized by law to take acknowledgments but whose deputy was not so authorized;

(6) The notary public failed to state the date of the expiration of his or her commission on the certificate of acknowledgment, or incorrectly stated it thereon;

(7) The officer incorrectly dated the certificate of acknowledgment or failed to state the county wherein the acknowledgment was taken; or

(8) The acknowledgment was certified in any county of the State of Arkansas by any person holding an unexpired commission as notary public under the laws of the state who had, at the time of the certification, ceased to be a resident of the county within and for which he or she was commissioned, shall be as binding and effectual as though the certificate of acknowledgment or proof of execution was in due form, bore the proper seal, and was certified to by a duly authorized officer.

(b) A deed, conveyance, deed of trust, mortgage, marriage contract, and other instrument in writing, affecting or purporting to affect the title to any real estate or personal property situated in this state, which is executed after August 13, 1993, shall not be deemed defective or ineffectual because:

(1) The officer failed or omitted to attach his or her seal to the certificate;

(2) The officer attached to any such certificate a seal not bearing the words and devices required by law;

(3) The notary public failed to state the date of the expiration of his or her commission on the certificate of acknowledgment, or incorrectly stated it thereon;

(4) The officer incorrectly dated the certificate of acknowledgment or failed to state the county wherein the acknowledgment was taken; or

(5) The acknowledgment was certified in any county of the State of Arkansas by any person holding an unexpired commission as notary public under the laws of the state who had, at the time of the certification, ceased to be a resident of the county within and for which he or she was commissioned.

(c) A deed, conveyance, deed of trust, mortgage, marriage contract, and any other instrument in writing, affecting or purporting to affect the title to any real estate or personal property situated in this state, whether executed before, on, or after April 8, 2013, shall not be found insufficient to satisfy the requirements of § 18-12-202:

(1) Because the acknowledgment thereof does not strictly comply with the form contained in § 16-47-107 or omits the words "for the consideration, uses, and purposes therein mentioned or set forth" or uses similar words;

(2) Because the gender listed in the acknowledgment thereof does not match the gender of the person acknowledging the instrument;

(3) Because the acknowledgment thereof does not identify the title or position of the person acknowledging the instrument on behalf of a corporation, partnership, company, trust, association, or other entity; or

(4) Where a good faith attempt at material compliance with § 16-47-107(a), (b), or (c), as applicable, has been made and there is no factual dispute as to the authenticity of the signature of the person making acknowledgement thereof.

(d) Notwithstanding an acknowledgment to a deed or other instrument which may contain one (1) or more of the defects set forth in this section, if a deed or other instrument is recorded, it shall:

(1) Provide constructive notice thereafter to all parties of the matters contained in the deed or other instrument; and

(2) Be treated as any other deed or instrument in writing under § 16-47-110, and may be read into evidence in any court in this state without further proof of execution.

(e) A valid jurat may act as a substitute for a certificate of acknowledgment for instruments recorded on or after April 8, 2013.

History. Acts 1955, No. 101, § 1; A.S.A. 1947, § 49-213; Acts 1993, No. 1081, §§ 1, 2; 2013, No. 999, § 4.

Publisher's Notes. For prior validating acts, see Acts 1873, No. 11, §§ 5, 6, p. 13; Acts 1873, No. 17, §§ 1, 2, p. 25; Acts 1873, No. 41, §§ 1, 2, p. 83; Acts 1883, No. 69, § 6, p. 106; Acts 1883, No. 80, § 1, p. 128; Acts 1885, No. 117, § 1, p. 191; Acts 1893, No. 43, § 1, p. 66; Acts 1893, No. 172, § 1, p. 303; Acts 1895, No. 33, § 1, p. 37; Acts 1897 (Ex. Sess.), No. 21, § 1, p. 58; Acts 1899, No. 56, § 1, p. 107; Acts 1899, No. 175, § 1, p. 313; Acts 1901, No.

41, § 1, p. 79; Acts 1903, No. 87, § 1, p. 150; Acts 1903, No. 87, § 2, p. 150; Acts 1907, No. 147, § 1, p. 354; Acts 1911, No. 24, § 1; Acts 1913, No. 148, § 1; Acts 1915, No. 54, § 1; Acts 1917, No. 142, § 1, p. 765; Acts 1917, No. 142, § 2, p. 765; Acts 1919, No. 333, § 1; Acts 1919, No. 524, § 1; Acts 1923, No. 80, § 1; Acts 1923, No. 185, § 1; Acts 1935, No. 72, § 1; Acts 1937, No. 352, § 1; Acts 1941, No. 422, § 1; Acts 1949, No. 291, § 1.

Amendments. The 2013 amendment changed the section heading without markup and added (c), (d), and (e).

RESEARCH REFERENCES

Ark. L. Rev. Validation of Instruments Affecting Title to Property, 9 Ark. L. Rev. 414.

Curative Statutes Affecting Title to Real Property in Arkansas, 12 Ark. L. Rev. 386.

CASE NOTES

ANALYSIS

Acknowledgment by Interested Party.
Failure to Sign.
Homesteads.
Lack of Acknowledgment.
Omission of Essential Words.
Vested Rights.

Acknowledgment by Interested Party.

An acknowledgment taken by an interested party does not authorize it to be

recorded and it imparts no notice; however, such acknowledgments taken before Acts 1883, No. 69, were validated by § 6 of that act. *Green v. Abraham*, 43 Ark. 420 (1884) (decision under prior law).

Acts 1893, No. 43, did not cure an acknowledgment which was taken by a party to the deed. *Meunse v. Harper*, 70 Ark. 309, 67 S.W. 869 (1902) (decision under prior law).

Failure to Sign.

Former curative act did not render valid

a certificate of acknowledgment which the notary failed to sign although he affixed the imprint of his seal. *Davis v. Hale*, 114 Ark. 426, 170 S.W. 99 (1914) (decision under prior law).

Homesteads.

A mortgage of a homestead which was invalid because the grantors' wives did not join therein, was cured by former validating act. *Sanders v. Flenniken*, 172 Ark. 454, 289 S.W. 485 (1926) (decision under prior law).

Lack of Acknowledgment.

The curative provisions of this section cannot supply an acknowledgment when in fact there is none. *Pardo v. Creamer*, 228 Ark. 746, 310 S.W.2d 218 (1958).

Where a mortgage only contained a jurat by a notary public which simply stated "Given under my hand and official seal this 24th day of November, 2003. [Signed by] Maria F. Looper," the mortgage was defective as it lacked an acknowledgment; this section did not cure the defect as it does not act to supply an acknowledgment when in fact there is none (decision under prior law). *In re Beene*, 349 B.R. 574 (Bankr. W.D. Ark. 2006).

Jurat attached to a mortgage was not an acknowledgment and, therefore, the mortgage lien was unperfected under Arkansas law; the provisions of this section

could not be used to cure the defect in the mortgage because it does not act to supply an acknowledgment when in fact there was none (decision under prior law). *In re Beene*, 354 B.R. 856 (Bankr. W.D. Ark. 2006).

This curative statute did not operate to cure a mortgage deed that failed to comply with the acknowledgement requirements in §§ 16-47-106 and 16-47-101 because the transaction occurred after the passage of the statute. Thus, a mortgage lien was not perfected and could be avoided by a trustee under 11 U.S.C.S. §§ 544(a) and 550(a). *Williams v. JPMorgan Chase Bank, N.A. (In re Stewart)*, 422 B.R. 185 (Bankr. W.D. Ark. 2009).

Omission of Essential Words.

An acknowledgment valid in the state where made but ineffectual at the time of recordation in Arkansas because of failure to use words required by § 18-12-206 was held to have been cured by former validating acts. *Jackson v. Hudspeth*, 208 Ark. 55, 184 S.W.2d 906 (1945) (decision under prior law).

Vested Rights.

Former acts, curing defective acknowledgments, did not interfere with vested rights. *McGehee v. McKenzie*, 43 Ark. 156 (1884) (decision under prior law).

Cited: *Sample v. Sample*, 237 Ark. 178, 372 S.W.2d 609 (1963).

18-12-209. Recorded deed or written instrument affecting real estate.

(a) Every deed or instrument in writing which conveys or affects real estate and which is acknowledged or proved and certified as prescribed by this act may, together with the certificate of acknowledgment, proof, or relinquishment of dower, be recorded by the recorder of the county where such land to be conveyed or affected thereby is located, and when so recorded may be read in evidence in any court in this state without further proof of execution.

(b) If it appears at any time that any deed or instrument duly acknowledged or proved and recorded as prescribed by this act is lost or not within the power and control of the party wishing to use the deed or instrument, the record thereof, or a transcript of the record certified by the recorder, may be read in evidence without further proof of execution.

(c) Neither the certificate of acknowledgment nor the probate of any such deed or instrument, nor the record or transcript thereof, shall be conclusive, but it may be rebutted.

History. Rev. Stat., ch. 31, §§ 26-28; C. & M. Dig., §§ 1530-1532; Pope's Dig., §§ 1840-1842; A.S.A. 1947, §§ 28-919 — 28-921.

Publisher's Notes. Rev. Stat., ch. 31, §§ 26-28, are also codified as § 16-47-110.

Meaning of "this act". See note to § 18-12-201.

RESEARCH REFERENCES

Ark. L. Rev. Documentary Evidence — Arkansas, 15 Ark. L. Rev. 79.

CASE NOTES

ANALYSIS

Admissibility.

—Copy of Record.

Burden of Proof.

Certificate.

Parol Evidence.

Prima Facie Evidence.

Admissibility.

The only showing upon which a deed can be admitted to evidence is the certificate of acknowledgment by the proper officer. *Simpson v. Montgomery*, 25 Ark. 365 (1869).

The acknowledgment of the execution of a deed of conveyance, as required by this section, does not alone authorize its introduction as evidence. It must also be filed and recorded or its execution proved at the trial. *Wilson v. Spring*, 38 Ark. 181 (1881); *Watson v. Billings*, 38 Ark. 278 (1881); *Dorr v. School Dist.*, 40 Ark. 237 (1882).

An unrecorded mortgage is inadmissible in evidence without proof of its execution. *Gardner v. Hughes*, 136 Ark. 332, 206 S.W. 678 (1918).

—Copy of Record.

A certified copy of a recorded conveyance is admissible in evidence without proof of the execution. *Apel v. Kelsey*, 47 Ark. 413, 2 S.W. 102 (1886); *Sibly v. England*, 90 Ark. 420, 119 S.W. 820 (1909).

If a plaintiff in ejectment is not able to introduce an original deed in evidence, a purported copy from the record is not admissible unless certified by the recorder. *Robert v. Brown*, 157 Ark. 230, 247 S.W. 1058 (1923).

In a prosecution for forgery, it was not improper to permit the introduction of the record of certain deed, in the chain of title to the land, concerning which it was alleged that forged deed had been uttered

by the defendant, without proof that the original deeds were either lost or destroyed. *Temple v. State*, 126 Ark. 290, 189 S.W. 855 (1916), overruled on other grounds, *Nail v. State*, 231 Ark. 70, 328 S.W.2d 836 (1959).

Burden of Proof.

The burden of proof rests upon the person denying that he signed a deed or acknowledged it, to show the falsity of the certificate, which carries the presumption that the officer making it has certified to the truth. *Polk v. Brown*, 117 Ark. 321, 174 S.W. 562 (1915); *Nevada County Bank v. Gee*, 130 Ark. 312, 197 S.W. 680 (1917).

The burden of disproving the authenticity of the acknowledgment of a deed before a notary public is on the moving party in order to have the recorded deed declared void for forgery. *Lytton v. Johnson*, 236 Ark. 277, 365 S.W.2d 461 (1963).

Certificate.

While it is competent for the maker of a deed to prove that there was no appearance before an officer to acknowledge its execution, and no acknowledgment in fact, yet if he did acknowledge it in some manner, the officer's certificate is conclusive as to the terms of the acknowledgment. *Petty v. Grisard*, 45 Ark. 117 (1885); *Steers v. Kinsey*, 68 Ark. 360, 58 S.W. 1050 (1900).

Parol Evidence.

Parol evidence that a deed has been executed, but not recorded, and lost, is sufficient to admit secondary evidence of its contents. *Calloway v. Cossart*, 45 Ark. 81 (1885); *Crawford v. McDonald*, 84 Ark. 415, 106 S.W. 206 (1907).

Parol evidence is admissible to prove true date of an acknowledgment. *Merrill v. Sypert*, 65 Ark. 51, 44 S.W. 462 (1898).

Prima Facie Evidence.

A recorded and properly acknowledged mortgage makes prima facie case thereon.

Straughan v. Bennett, 153 Ark. 254, 240 S.W. 30 (1922).

SUBCHAPTER 3 — FEE TAIL

SECTION.

18-12-301. Considered life estate.

18-12-302. Dissolution.

SECTION.

18-12-303. Rule in Shelley's Case abolished.

Preambles. Acts 1957, No. 163 contained a preamble which read: "Whereas, the estate tail is a relic of medieval times and seldom desirable in view of the current necessity for credit and for transfer of title incident to the growth of communities, but nevertheless such an estate is often created without a realization of the delay and difficulty imposed on a convey-

ance of the land involved, which imposition is later sought to be dissolved; and

"Whereas, the common law remedy of fine and common recovery for dissolution of said estates is no longer available as a method dissolving same and a substitute therefore should be provided;

"Now, therefore...."

RESEARCH REFERENCES

Ark. L. Rev. Transmissibility of Certain Contingent Future Interests, 5 Ark. L. Rev. 111.

Real Property — Rule in Shelley's Case as a Rule of Law or Construction, 7 Ark. L. Rev. 411.

The Effect of Stare Decisis Upon Fee Tail in Arkansas, 10 Ark. L. Rev. 181.

The Entailed Estate: Ferment for Reform in Arkansas, 19 Ark. L. Rev. 275.

Destructibility of Contingent Remainders, 21 Ark. L. Rev. 145.

Some Reflections of an Arkansas Property Teacher Upon Reading Professor

Leach's "Property Law Indicted," 21 Ark. L. Rev. 567.

Medieval Law in the Age of Space: Some "Rules of Property" in Arkansas, 22 Ark. L. Rev. 248.

Legislative and Judicial Dynamism in Arkansas: *Poisson v. d'Avril*, 22 Ark. L. Rev. 724.

U. Ark. Little Rock L.J. Note — Property — Court of Equity Has the Power to Order a Sale for Reinvestment Even Though No Member of the Class Having a Contingent Future Interest Is Yet in Existence, 6 U. Ark. Little Rock L.J. 321.

CASE NOTES**Purpose.**

The legislature has undertaken not only to regulate the fee tail estate but also to provide a method for its dissolution and

the courts should not go beyond the public policy as established by this subchapter. *Tucker v. Walker*, 246 Ark. 177, 437 S.W.2d 788 (1969).

18-12-301. Considered life estate.

In cases when, by common law, any person may become seized in fee tail of any lands or tenements, by virtue of any devise, gift, grant, or other conveyance, the person, instead of being, or becoming, seized thereof in fee tail, shall be adjudged to be, and become, seized thereof for his or her natural life only. The remainder shall pass in fee simple

absolute to the person to whom the estate tail would first pass according to the course of the common law by virtue of the devise, gift, grant, or conveyance.

History. Rev. Stat., ch. 31, § 5; C. & M. Dig., § 1499; Pope's Dig., § 1799; A.S.A. 1947, § 50-405.

CASE NOTES

ANALYSIS

Conveyance.

—Words of Conveyance.

Remainder.

—Vesting.

Rule in Shelley's Case.

Conveyance.

Deed, devise, etc., held to create fee tail estate subject to this section. *Horsley v. Hilburn*, 44 Ark. 458 (1884); *Wheelock v. Simons*, 75 Ark. 19, 86 S.W. 830 (1905); *Mercantile Trust Co. v. Adams*, 95 Ark. 333, 129 S.W. 1101 (1910); *Mitchell v. Mitchell*, 208 Ark. 478, 187 S.W.2d 163 (1945); *Tucker v. Walker*, 246 Ark. 177, 437 S.W.2d 788 (1969).

Deed, devise, etc., held to create life estate with remainder in life tenant's children. *Wheelock v. Simons*, 75 Ark. 19, 86 S.W. 830 (1905); *Fine v. McGowan*, 186 Ark. 1035, 57 S.W.2d 565 (1933); *Mitchell v. Mitchell*, 208 Ark. 478, 187 S.W.2d 163 (1945); *Wilkins v. Wilkins*, 212 Ark. 242, 206 S.W.2d 26 (1947); *Bradley Lumber Co. v. Burbridge*, 213 Ark. 165, 210 S.W.2d 284 (1948); *Weatherly v. Purcell*, 217 Ark. 908, 234 S.W.2d 32 (1950); *Toney v. Toney*, 218 Ark. 433, 236 S.W.2d 716 (1951); *Robertson v. Sloan*, 222 Ark. 671, 262 S.W.2d 148 (1953); *Lewis v. Bowlin*, 237 Ark. 947, 377 S.W.2d 608 (1964); *Fletcher v. Hurdle*, 259 Ark. 640, 536 S.W.2d 109 (1976); *Spence v. Spence*, 271 Ark. 697, 610 S.W.2d 264 (1981).

A grant by deed from husband to wife which in the habendum limited the estate to the wife and her heirs by the grantor born of her body held to create a life estate in the wife. *Georgia State Sav. Ass'n v. Dearing*, 128 Ark. 149, 193 S.W. 512 (1917).

—Words of Conveyance.

The term "heirs of the body" has an appropriate technical meaning as words of

limitation to designate heirs in succession. *Myar v. Snow*, 49 Ark. 125, 4 S.W. 381 (1887).

The words "children, the natural offspring of her body" are synonymous with "bodily heirs" or "heirs of her body" and exclude the idea that they are synonymous with the general word "heirs." *Dempsey v. Davis*, 98 Ark. 570, 136 S.W. 975 (1911).

"Natural heirs" means "heirs of the body." *Maynard v. Henderson*, 117 Ark. 24, 173 S.W. 831 (1915).

Language "unto their heirs only forever" did not destroy technical meaning of "unto their heirs" which creates a fee simple absolute, and change the limitation to mean "unto their bodily heirs" which under this section would create a life estate in the grantee with remainder in his bodily heirs. *United States v. 48.9 Acres of Land*, 85 F. Supp. 133 (W.D. Ark. 1949).

The words "die without heirs" in devise of life estate and remainder meant the death without children of the remainderman before the termination of the life estate of the widow. *In re Estate of Creekmore*, 244 Ark. 1, 423 S.W.2d 548 (1968).

Remainder.

Where the grantee of a fee tail estate died leaving a husband and son surviving, the remainder in fee was in the son and the husband took no interest whatsoever in the estate. *Maynard v. Henderson*, 117 Ark. 24, 173 S.W. 831 (1915).

The entire estate, except the possibility of reverter, passes from the grantor of a fee tail who cannot thereafter defeat the rights of the remaindermen in the land, and this is without regard to whether the fee is considered in abeyance during the estate of the life tenant, or still held by the original grantor for purposes only of passing to the remaindermen upon termination of the life estate. *Le Sieur v. Spikes*, 117 Ark. 366, 175 S.W. 413 (1915).

Remaindermen held to take fee simple estate. *Pletner v. Southern Lumber Co.*, 173 Ark. 277, 292 S.W. 370 (1927); *Bowlin v. Vinsant*, 186 Ark. 740, 55 S.W.2d 927 (1933); *Cox v. Danehower*, 211 Ark. 696, 202 S.W.2d 200 (1947).

The foreclosure of mortgage on land, part of which had been conveyed to the mortgagor and the heirs of her body, was ineffective as to the interest of her children. *Metropolitan Life Ins. Co. v. Gardner*, 245 Ark. 742, 434 S.W.2d 266 (1968).

—Vesting.

An estate to the grantee and bodily heirs did not vest in remainder in anyone during the life of the grantee holding under the life estate, but vested in the surviving children and their issue at the death of the life tenant. *Horsley v. Hilburn*, 44 Ark. 458 (1884).

The grantee of a fee tail could not, by her conveyance before the birth of her children, convey more than an estate terminable upon her death, the remainder in fee immediately vesting in her children surviving at that time and their issue, and right of action will not accrue until death of the life tenant. *Le Sieur v. Spikes*, 117 Ark. 366, 175 S.W. 413 (1915).

An estate to the grantee and bodily heirs vests the remainder in the children living at the time of the conveyance subject to opening up to let in other children; and upon a showing that the life tenant is past the age of giving birth to a child, the remaindermen may join with the life ten-

ant in giving merchantable title. *Landers v. People's Bldg. & Loan Ass'n*, 190 Ark. 1072, 81 S.W.2d 917 (1935).

Where remainderman had only a contingent interest, deed by devisee and remainderman did not pass merchantable title. *Peebles v. Garland*, 221 Ark. 185, 252 S.W.2d 396 (1952).

Rule in Shelley's Case.

The rule in Shelley's Case is in force in this state except so far as repealed by this section. *Hardage v. Stroope*, 58 Ark. 303, 24 S.W. 490 (1893); *Ryan v. Ryan*, 138 Ark. 362, 211 S.W. 183 (1919).

Rule held applicable. *Hardage v. Stroope*, 58 Ark. 303, 24 S.W. 490 (1893); *First Nat'l Bank v. Graham*, 195 Ark. 586, 113 S.W.2d 497 (1938).

Rule held inapplicable. *Wilmans v. Robinson*, 67 Ark. 517, 55 S.W. 950 (1900); *Rogers v. Ogburn*, 116 Ark. 233, 172 S.W. 867 (1915); *Georgia State Sav. Ass'n v. Dearing*, 128 Ark. 149, 193 S.W. 512 (1917); *Robertson v. Sloan*, 222 Ark. 671, 262 S.W.2d 148 (1953).

The rule in Shelley's Case is only applicable when the language of the will or conveyance creates a limitation to the heirs of the devisees or grantee in general; if the limitation is to the bodily heirs or the heirs of the body of the grantee, then the rule in Shelley's Case has no application. *Gray v. McGuire*, 140 Ark. 109, 215 S.W. 693 (1919).

Cited: *Sligh v. Plair*, 263 Ark. 936, 569 S.W.2d 58 (1978); *Sides v. Beene*, 327 Ark. 401, 938 S.W.2d 840 (1997).

18-12-302. Dissolution.

(a)(1) Any estate which under the common law would be deemed an estate tail or a fee tail estate or any estate created by reason of a conveyance to a grantee or grantees and the heirs of his or her body or to other contingent remaindermen may be dissolved by the grantor creating such an estate and all life tenants and all of the other persons then living who might be remaindermen in event of the death of the life tenant or tenants executing a conveyance of the fee.

(2) The conveyance shall vest in the grantee the fee simple title to the lands therein conveyed.

(b) The method of extinguishing the estates mentioned in subsection (a) of this section shall apply equally to those estates now in existence and to those which may hereafter come into existence.

(c) The rights and privileges provided by this section are permissive and cumulative to the rights and remedies now existing under the laws of this state.

History. Acts 1957, No. 163, §§ 1-3; A.S.A. 1947, §§ 50-405.1 — 50-405.3.

Publisher's Notes. Acts 1957, No. 163,

§ 4, provided that the act would not affect law suits pending in the courts on the effective date of the act.

CASE NOTES

Constitutionality.

This section is not contrary to any provision of the state constitution nor does it violate the federal constitution. Anderson

v. Webb, 241 Ark. 233, 406 S.W.2d 871 (1966).

Cited: Sligh v. Plair, 263 Ark. 936, 569 S.W.2d 58 (1978).

18-12-303. Rule in Shelley's Case abolished.

(a)(1) The Rule in Shelley's Case is abolished and shall not be recognized by any court of this state.

(2) This section is intended to annul the application or effect of the Rule in Shelley's Case on any instrument or interest in real property.

(b) When any instrument prepared or executed after July 16, 2003, conveys an interest in any real property to be given to the heirs or issue of any person in words which, under the rule of construction known as the "Rule in Shelley's Case" would have operated to give to that person an interest in fee simple, those words shall operate as words of purchase and not of limitation.

History. Acts 2003, No. 1030, § 1.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2003 Arkansas General Assembly, Property Law, Abolishment of

Rule in Shelley's Case, 26 U. Ark. Little Rock L. Rev. 459.

SUBCHAPTER 4 — HUSBAND AND WIFE

SECTION.

18-12-401. Deed between spouses.

18-12-402. Relinquishment of dower or curtesy in spouse's land.

18-12-403. Conveyance, etc., of homestead.

SECTION.

18-12-404. Conveyance of interest of husband with mental illness and guardian appointed — Relinquishment of dower.

Cross References. Married woman's separate property, right of disposition, Ark. Const., Art. 9, § 7.

Effective Dates. Acts 1887, No. 64, § 3: effective on passage.

Acts 1919, No. 324, § 2: Mar. 21, 1919. Emergency declared.

Acts 1919, No. 325, § 2: Mar. 21, 1919. Emergency declared.

Acts 1981, No. 714, § 75: Mar. 25, 1981. Emergency clause provided: "It has been

found and is declared by the General Assembly of Arkansas that existing law relating to such matters as homestead, dower, curtesy, statutory allowances payable from a decedent's estate, and the right of a surviving spouse to take against the will of a decedent, do not in all circumstances provide for equal treatment between the sexes, that the constitutionality of such existing law has been drawn into question by decisions of the United States

Supreme Court and the Arkansas Supreme Court, and that there is an urgent need to insure that the law provides equality in the property rights and interests of married persons. Therefore, an

emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

18-12-401. Deed between spouses.

(a) Any deed of conveyance of real property located in this state executed after the passage of this act by a married man directly to his wife or by a married woman directly to her husband shall be construed as conveying to the grantee named in the deed the entire interest of the grantor in the property conveyed, or the interest specified in the deed, as fully and to all intents and purposes as if the marital relation did not exist between the parties to the deed.

(b)(1) All deeds of conveyance of real property in this state executed prior to the passage of this act by an individual to his or her spouse shall be construed as conveying to the respective grantees in the deeds the full and entire interests of the respective grantors in the deeds, or the interests specified in the deeds respectively, as fully and to all intents and purposes as if the spousal relation had not existed between the parties to the deeds.

(2) This subsection shall not be construed as applying to any deed which has been construed by any court of competent jurisdiction.

(c) The word "deed" as used in this section, shall be construed to include any and all instruments of writing affecting, or purporting to affect, the title to real property, either by way of conveyance or encumbrance.

(d) The purpose of this section is to empower married men to contract with their wives and married women to contract with their husbands in regard to real property in like manner and to the same effect as if married men and married women were unmarried.

History. Acts 1935, No. 86, §§ 1-3; Pope's Dig., §§ 1866-1868; A.S.A. 1947, §§ 50-413, 50-413n, 50-414.

Publisher's Notes. In reference to the

term "passage of this act," Acts 1935, No. 86, was signed by the Governor on March 2, 1935, and took effect on June 13, 1935.

RESEARCH REFERENCES

Ark. L. Rev. Real Property — Creation of a Tenancy by the Entirety by a Convey-

ance from One Spouse to Husband and Wife, 7 Ark. L. Rev. 69.

CASE NOTES

ANALYSIS

Interest Conveyed.
Tenancy by Entirety.

Interest Conveyed.

A warranty deed to real property executed by a husband to his wife conveyed the entire interest in the property to his wife. *Sandidge v. Sandidge*, 212 Ark. 608, 206 S.W.2d 755 (1947).

Tenancy by Entirety.

Conveyance in a divorce settlement by husband directly to wife of real estate held as tenants by entirety was valid. *Ryan v. Roop*, 214 Ark. 699, 217 S.W.2d 916 (1949).

Husband's interest in estate by entirety may be conveyed to wife. *Weir v. Brigham*, 218 Ark. 354, 236 S.W.2d 435 (1951).

Spouse owning real estate in own name can make direct conveyance of title to both spouses as tenants by the entirety. *Ebrite v. Brookhyser*, 219 Ark. 676, 244 S.W.2d 625 (1951); *Harmon v. Thompson*, 223 Ark. 10, 263 S.W.2d 903 (1954).

Cited: *West v. Smith*, 225 Ark. 365, 282 S.W.2d 597 (1955); *Redmon v. Hill*, 233 Ark. 45, 342 S.W.2d 410 (1961); *Johnson v. Johnson*, 237 Ark. 311, 372 S.W.2d 598 (1963); *Schichtel v. Schichtel*, 3 Ark. App. 36, 621 S.W.2d 504 (1981); *Crowder v. Crowder*, 303 Ark. 562, 798 S.W.2d 425 (1990); *McCracken v. McCracken*, 2009 Ark. App. 758, 358 S.W.3d 474 (2009).

18-12-402. Relinquishment of dower or curtesy in spouse's land.

A married person may relinquish dower or curtesy in any of the real estate of a spouse by joining with the spouse in the deed of conveyance thereof, or by a separate instrument executed to spouse's grantee or anyone claiming title under the spouse, and acknowledging it in the manner prescribed by law.

History. Rev. Stat., ch. 31, § 11; Acts 1919, No. 324, § 1; C. & M. Dig., § 1506;

Pope's Dig., § 1815; Acts 1981, No. 714, § 5; A.S.A. 1947, § 50-416.

CASE NOTES

ANALYSIS

Contract for Relinquishment.
Effect of 1919 Amendment.
Joining in Deed.
Minors.
Nonresident.
Property Settlement.

Contract for Relinquishment.

A husband had a right to contract with his wife to pay her a portion of the proceeds of the sale of real estate to induce her to relinquish her right to dower. *Le Croy v. Cook*, 211 Ark. 966, 204 S.W.2d 173 (1947).

Wife executed a quitclaim deed and an agreed order conveying her interest in the marital home to her ex-husband, but no such release of rights was executed by the homeowner; therefore, because homeowner did not join in the deed with his

wife when she conveyed her interest in the property to her ex-husband, the statutory requirements of this section were not satisfied. *O'Marra v. MacKool*, 361 Ark. 32, 204 S.W.3d 49 (2005).

Effect of 1919 Amendment.

The 1919 amendment was not a curative statute and did not operate to validate conveyances irregular prior to its enactment. *Fulk v. Robinson*, 140 Ark. 212, 215 S.W. 674 (1919).

Joining in Deed.

Acknowledgment of deed, without joining in the deed, is not sufficient. *Witter v. Biscoe*, 13 Ark. 422 (1853) (decision prior to 1919 amendment).

A married woman could not release dower in favor of her husband; she could only release it by joining with the husband in a deed to a third person. *Countz v. Markling*, 30 Ark. 17 (1875); *Pillow v.*

Wade, 31 Ark. 678 (1877) (preceding decisions prior to 1919 amendment).

When a husband's deed is followed by a paragraph relinquishing dower, and then follow the signatures of both husband and wife, this is such joining in the deed as is required for the relinquishment of dower. *Meyer v. Gossett*, 38 Ark. 377 (1882).

A wife may relinquish her dower by joining in her husband's deed and acknowledging it without any clause of relinquishment in the deed. *Dutton v. Stuart*, 41 Ark. 101 (1883).

When a married woman joins her husband in the execution of a deed in which she has no estate except a contingent right of dower, and the deed contains no clause relinquishing dower, her right to dower is barred thereby, if the deed is

properly acknowledged. *Johnson v. Parker*, 51 Ark. 419, 11 S.W. 681 (1889).

Minors.

The relinquishment of dower by a married woman while under lawful age is voidable. *Watson v. Billings*, 38 Ark. 278 (1881).

Nonresident.

A married woman residing in another state can convey land in Arkansas only in the manner prescribed by statute. *McDaniel v. Grace*, 15 Ark. 465 (1855).

Property Settlement.

Property settlement agreement between husband and wife was not sufficient to convey dower rights. *Whitener v. Whitener*, 227 Ark. 1038, 304 S.W.2d 260 (1957).

18-12-403. Conveyance, etc., of homestead.

No conveyance, mortgage, or other instrument affecting the homestead of any married person shall be of any validity, except for taxes, laborers' and mechanics' liens, and purchase money, unless his or her spouse joins in the execution of the instrument, or conveys by separate document, and acknowledges it.

History. Acts 1887, No. 64, § 1, p. 90; C. & M. Dig., § 5542; Pope's Dig., § 7181; Acts 1981, No. 714, § 4; A.S.A. 1947, § 50-415; Acts 1993, No. 1164, § 1.

A.C.R.C. Notes. Acts 1993, No. 1164, § 2, provided: "Conveyances, mortgages and other instruments affecting the homestead of married persons which were ex-

ecuted prior to the effective date of this act shall not be deemed invalid solely because the spouses failed to sign and acknowledge the same document."

Cross References. Validation of instruments not complying with this section, § 16-47-108.

RESEARCH REFERENCES

Ark. L. Notes. Laurence, Does Arkansas's Homestead Exemption Survive a Divorce? Should It?, 1988 Ark. L. Notes 15.

Ark. L. Rev. Bryan Malloy, Case Note:

Minor Fix or Major Pain: The Impact of *Fitton v. Bank of Little Rock* on Arkansas's Homestead Exemption, 66 Ark. L. Rev. 577 (2013).

CASE NOTES

ANALYSIS

Constitutionality.

Purpose.

Applicability.

Abandonment.

Burden of Proof.

Compliance.

—Effect of Noncompliance.

—Intent of Spouse.

—Manner.

—Release of Dower.

Contract to Convey Homestead.

Conveyance Between Spouses.

Conveyance by Will.

Curative Acts.

Divorce.

Estoppel.

Fraud.

Gift.

Instruments Affecting Homestead.

Purchase Money.

Note. — Most of the following cases were decided prior to the 1981 amendment to this section which made the section apply to conveyances by wives as well as by husbands.

Constitutionality.

The gender-based discrimination contained in this section prior to its 1981 amendment served no valid governmental interest; accordingly, it unconstitutionally violated the equal protection clause of the fourteenth amendment to the United States Constitution. *Conser v. Bidby*, 274 Ark. 367, 625 S.W.2d 457 (1981) (decision prior to 1981 amendment).

Purpose.

The legislature undertook to create no interest or estate by this section, but to prescribe the manner in which instruments affecting the homestead of a married man should be executed and acknowledged. *Sidway v. Lawson*, 58 Ark. 117, 23 S.W. 648 (1893) (decision prior to 1981 amendment).

The purpose of this section was to protect the wife by forbidding the husband either to sell by absolute conveyance or encumber the homestead without the wife joining in the deed. *Park v. Park*, 71 Ark. 283, 72 S.W. 993 (1903); *Conser v. Bidby*, 274 Ark. 367, 625 S.W.2d 457 (1981) (decisions prior to 1981 amendment).

Applicability.

Provision of this section declaring that no instrument affecting homestead is valid unless signed by wife applies also to insane wife not under guardianship. *Penney v. Vessells*, 221 Ark. 389, 253 S.W.2d 968 (1952) (decision prior to 1981 amendment).

Section not applicable to conveyance of property other than homestead. *Hickerson v. Lyon*, 229 Ark. 24, 312 S.W.2d 930 (1958).

Abandonment.

A conveyance invalid under this section is not cured by subsequent abandonment, and the homestead becomes liable to attachment for the homesteader's debts

which relate back to the date of the lien of the writ, and where antedating the deed, give a lien prior to any title acquired under it. *Pipkin v. Williams*, 57 Ark. 242, 21 S.W. 433 (1893); *Newman v. Jacobson*, 108 Ark. 297, 158 S.W. 134 (1913).

The husband could abandon the homestead and it would become liable to his debts notwithstanding this section. *Sidway v. Lawson*, 58 Ark. 117, 23 S.W. 648 (1893).

While this section is a limitation upon the right of a husband to convey his homestead, it does not restrict his right of abandonment; and when he exercises his right of abandonment of the homestead, it is not required that the wife join in conveyance of the abandoned homestead. *Farmers' Sav. Bldg. & Loan Ass'n v. Jones*, 68 Ark. 76, 56 S.W. 1062 (1900); *Stewart v. Pritchard*, 101 Ark. 101, 141 S.W. 505 (1911).

The right of abandonment is restricted to abandonment and selection of another or none, and if a husband deserts his family and abandons the homestead without his family joining in the abandonment, he cannot thereafter convey the homestead without the wife joining. *Montgomery v. Dane*, 81 Ark. 154, 98 S.W. 715 (1906).

While the husband may not convey the homestead without his wife's consent, he may abandon it without her consent. *Brown v. Brown*, 104 Ark. 313, 149 S.W. 330 (1912); *Vestal v. Vestal*, 137 Ark. 309, 209 S.W. 273 (1919).

Husband may abandon homestead without wife's consent if he has not deserted his wife and abandoned his family. *McKenzie v. Rumph*, 171 Ark. 791, 286 S.W. 1022 (1926).

Burden of Proof.

A married woman suing to set aside a mortgage of her homestead apparently signed and acknowledged by her has the burden of establishing that she did not sign or acknowledge it. *Walthall v. McArthur*, 185 Ark. 437, 48 S.W.2d 227 (1932).

Burden was on party who asserted that contract was void because the land constituted the homestead of the grantor and the wife did not join in written conveyance. *Kinney v. Patterson*, 225 Ark. 393, 282 S.W.2d 809 (1955).

Compliance.

—Effect of Noncompliance.

Deeds made without regard to this section are void absolutely, and not relatively, to every extent and as to all persons and leave the title as if they had not been made. *Pipkin v. Williams*, 57 Ark. 242, 21 S.W. 433 (1893).

An absolute conveyance by the husband of the homestead with a reservation in himself of a life estate without the wife joining is in detriment of the wife's interest and void. *Park v. Park*, 71 Ark. 283, 72 S.W. 993 (1903).

A conveyance of the homestead without the wife joining is void even though she lives in another state. *Mason v. Dierks Lumber & Coal Co.*, 94 Ark. 107, 125 S.W. 656 (1910).

Husband's assignment of his paid-up contract of purchase of homestead as security for a loan, the wife failing to join therein, was void. *Watson v. Poindexter*, 176 Ark. 1065, 5 S.W.2d 299 (1928).

Easement for right-of-way over homestead, not acknowledged by the wife, was void. *Autrey v. Lake*, 195 Ark. 243, 112 S.W.2d 434 (1938); *Arkansas State Hwy. Comm'n v. Marlar*, 247 Ark. 710, 447 S.W.2d 329 (1969).

It does not matter whether property is owned by husband or wife, where property constitutes homestead, contract is void when wife does not sign. *Bowden v. Wilson*, 214 Ark. 828, 218 S.W.2d 374 (1949).

The nonjoinder of a spouse in the anticipated conveyance of real estate is not such a defect in the title as would prevent real estate broker from recovering commission after he secured buyer. *Portis v. Thrash*, 216 Ark. 946, 229 S.W.2d 127 (1950).

Wife's failure to join in the contract of sale of an urban homestead renders it absolutely void with respect to the homestead of at least the constitutional minimum of a quarter of an acre. *Rowe v. Gose*, 240 Ark. 722, 401 S.W.2d 745 (1966).

Where wife did not join in execution of lease by husband to his mother of property including the homestead, and land involved was not within an incorporated town or city, the entire tract was the homestead, regardless of value, and the lease was void. *George v. George*, 267 Ark. 823, 591 S.W.2d 655 (Ct. App. 1979).

Where husband and wife each executed separate quitclaim deeds conveying same

property to wife's parents, deeds were void because spouse did not join in either deed, and subsequent deed of correction signed by both parties did not validate the void deeds and property did not actually convey until date on which deed of correction was executed. *Blackford v. Dickey*, 302 Ark. 261, 789 S.W.2d 445 (1990).

—Intent of Spouse.

If the deed shows an intent on the part of the wife to join with her husband in the conveyance of the homestead, there is compliance with this section. *Gantt v. Hildreth*, 90 Ark. 113, 118 S.W. 255 (1909); *A.R. Bowdre & Co. v. Pitts*, 94 Ark. 613, 128 S.W. 57 (1910).

Where mortgage specifically provided for the release of former wife's homestead interests but did not specifically mention husband's homestead interests, and because a conveyance may include unspecified homestead interests if the conveyance is intended to transfer all interests in the property, the document was conclusive on the question of intent to convey homestead interests, and the plaintiff husband and his former wife waived their homestead interests in real property. *In re Holder*, 52 B.R. 37 (Bankr. W.D. Ark. 1985).

—Manner.

Form of compliance is immaterial so long as the two substantive acts (joinder in execution and acknowledgment) prescribed as prerequisites appear in the deed, and unless they do appear, the deed is void. *Pipkin v. Williams*, 57 Ark. 242, 21 S.W. 433 (1893).

Where the wife's name did not appear in the body of the deed but was subscribed in the acknowledgment, there was sufficient compliance with this section. *Ward v. Stark Bros.*, 91 Ark. 268, 121 S.W. 382 (1909).

To execute a valid deed of trust on homestead property, the wife must join in and acknowledge that she has executed the deed. *Davis v. Hale*, 114 Ark. 426, 170 S.W. 99 (1914).

If the wife actually joins in executing the deed, and then acknowledges its execution before an officer authorized to certify acknowledgments, she has done all the substantive acts required; and, as this section prescribes no form or manner of doing them, there cannot be noncompli-

ance with its provisions for matter of form merely; whenever a substantial compliance appears, this section is satisfied and the deed will be valid. *Mayfield v. Sehon*, 205 Ark. 1142, 172 S.W.2d 914 (1943).

It is not essential to the validity of a deed of trust on the homestead that the name of the wife appear in the granting clause, nor that the word "homestead" be used. *Mayfield v. Sehon*, 205 Ark. 1142, 172 S.W.2d 914 (1943).

—Release of Dower.

A release of dower and nothing more, in a clause following the granting clause, is not a joinder with the grantor in conveyance of the homestead. *Pipkin v. Williams*, 57 Ark. 242, 21 S.W. 433 (1893).

Joinder in acknowledgment of a deed is not sufficient compliance if the acknowledgment, insofar as the wife is concerned, is an acknowledgment merely of a relinquishment of dower. *Bank of Harrison v. Gibson*, 60 Ark. 269, 30 S.W. 39 (1895).

Although the wife's name did not appear in the granting clause but was subscribed with the other grantors in the acknowledgment, and the deed contained no clause as to the relinquishment of dower, there was sufficient compliance with this section. *Sledge & Norfleet Co. v. Craig*, 87 Ark. 371, 112 S.W. 892 (1908).

Where the acknowledgment recited that the wife relinquished both dower and homestead but the body of the instrument contained a clause that she relinquished dower but it was not perfectly evident that she joined in its execution, it was held that there was a relinquishment of dower only and the conveyance was void. *Shurn v. Wilkinson*, 131 Ark. 167, 198 S.W. 279 (1917).

Contract to Convey Homestead.

Husband cannot make contract to convey homestead which will bind his wife; and equitable title did not pass even though the wife joined the husband in a deed after the homestead was destroyed by fire. *Waters v. Hanley*, 120 Ark. 465, 179 S.W. 817 (1915).

There is no liability for breach of contract to convey homestead where wife refuses to join in the conveyance. *Ferrell v. Wood*, 149 Ark. 376, 232 S.W. 577 (1921).

Conveyance Between Spouses.

This section does not require that the wife join in a conveyance from her hus-

band to herself. *Kindley v. Spraker*, 72 Ark. 228, 79 S.W. 766 (1904).

A wife must join in conveyance to herself and her children, otherwise it would be invalid as to the children. *Stephens v. Stephens*, 108 Ark. 53, 156 S.W. 837 (1913). But see *Polk v. Stephens*, 126 Ark. 159, 189 S.W. 837 (1916).

Conveyance of homestead to wife and children is valid if accepted by wife. *Polk v. Stephens*, 126 Ark. 159, 189 S.W. 837 (1916); *Graham v. Inlow*, 296 Ark. 165, 753 S.W.2d 277 (1988).

A conveyance of homestead by husband to wife is valid if accepted by wife. *Lathrop v. Sandlin*, 223 Ark. 774, 268 S.W.2d 606 (1954); *Graham v. Inlow*, 296 Ark. 165, 753 S.W.2d 277 (1988).

Conveyance by Will.

Bequest of testator's homestead to wife and child for life with remainder to another did not invalidate a will. The homestead was not affected since remainderman was given no right until the homestead ceased to exist. *Reeves v. Bridges*, 193 Ark. 292, 99 S.W.2d 242 (1936).

Curative Acts.

Acts 1893, No. 172, p. 303 cured defective deeds as between the parties, but the vested rights of third persons acquired between the enactment of this section and April 13, 1893 were not affected by the curative act. *Sidway v. Lawson*, 58 Ark. 117, 23 S.W. 648 (1893); *Bluff City Lumber Co. v. Bloom*, 64 Ark. 492, 43 S.W. 503 (1897).

A conveyance of a homestead which was defective because it did not conform to this section was cured by the passage of Acts 1899, No. 56, p. 107. *McDaniels v. Sammons*, 75 Ark. 139, 86 S.W. 997 (1905); *Rhea v. Planters' Mut. Ins. Ass'n*, 77 Ark. 57, 90 S.W. 850 (1905).

Conveyance improperly acknowledged was made valid by Acts 1923, p. 43. *Flannigan v. Beavers*, 172 Ark. 28, 287 S.W. 755 (1926); *Sanders v. Flenniken*, 172 Ark. 454, 289 S.W. 485 (1926).

Where wife refused to sign a trust deed conveying homestead, the trust deed was void, and not cured by Acts 1923, p. 43. *Ramey v. Pyles*, 182 Ark. 320, 31 S.W.2d 533 (1930).

Divorce.

Divorce decree divests the wife of homestead rights. *Johnson v. Commonwealth*

Bldg. & Loan Ass'n, 182 Ark. 226, 31 S.W.2d 136 (1930); *Elms v. Hall*, 214 Ark. 601, 215 S.W.2d 1021 (1948).

Estoppel.

Where the grantor intentionally misrepresents himself as a single man in the conveyance of his homestead, he and his privities in blood and estate are estopped to cancel the deed; but the wife is not. *Mason v. Dierks Lumber & Coal Co.*, 94 Ark. 107, 125 S.W. 656 (1910).

A wife by joining in her husband's conveyance in fee abandoned her rights in the homestead and could not thereafter be a proper party in foreclosure proceeding of a mortgage previously given by the husband under a false representation that he was a single man. *Johnson v. Commonwealth Bldg. & Loan Ass'n*, 182 Ark. 226, 31 S.W.2d 136 (1930).

Judgment cannot be rendered against the wife in mortgage foreclosure proceeding against the homestead where she did not join in the mortgage, and she is not estopped by the fact that the husband borrowed the money when she had no knowledge of the existence of the mortgage. *Callaway v. Ashby*, 192 Ark. 929, 95 S.W.2d 907 (1936).

Deed conveying timber on lands constituting grantor's homestead, not executed or acknowledged by wife, is void, but wife who knew of conveyance and received the benefits of payments on the purchase price was estopped from questioning its validity. *Edwards v. Jones*, 197 Ark. 229, 123 S.W.2d 286 (1939).

Where wife did not protest renewal of mortgage without her signature, and did not present evidence showing that she had no knowledge of renewal of mortgage or that she had not shared in the benefits of the proceeds of the original loan, wife was estopped from applying this section. *In re Beard*, 108 B.R. 212 (Bankr. W.D. Ark. 1989).

Although an instrument affecting the homestead of a married person is generally invalid unless the person's spouse joins in the instrument, a spouse may be estopped to deny the validity of an instrument in which he or she did not join. *Smith v. Parker*, 67 Ark. App. 221, 998 S.W.2d 1 (1999).

The appellants were estopped from arguing that a lease was void for want of the signature of the wife of the original lessor

where the wife was aware of the lease, accepted the monetary benefits of the lease, and expressed no objection that her name was not on the lease. *Smith v. Parker*, 67 Ark. App. 221, 998 S.W.2d 1 (1999).

Fraud.

An acknowledgment valid to convey the wife's dower will be sufficient to relinquish homestead rights even though the wife was induced to execute it by misrepresentations that the mortgage did not cover the homestead. *Hill v. Yarborough*, 62 Ark. 320, 35 S.W. 433 (1896).

Where a husband procured his wife to join in a deed conveying their homestead by false pretenses and the homestead was thereafter reconveyed to him for life with remainder to his children, the conveyance was a fraud upon the wife's right to dower and homestead. *Colegrove v. Colegrove*, 89 Ark. 182, 116 S.W. 190 (1909).

No fraud or undue influence actually exercised over the wife by the husband can vitiate the conveyance if the grantee be no party to the improper influence and has no knowledge of it. *Harper v. McGooogan*, 107 Ark. 10, 154 S.W. 187 (1913).

Gift.

Husband cannot give part of homestead away without wife's joinder. *McLeod v. McLeod*, 130 Ark. 481, 198 S.W. 115 (1917).

Instruments Affecting Homestead.

Where a quitclaim instrument expressly recognized the wife's homestead and reserved that right to her, it was not an "instrument affecting the homestead" within the prohibition of this section. *Conser v. Biddy*, 274 Ark. 367, 625 S.W.2d 457 (1981).

Homestead exemption could extend to a revocable trust where the person claiming the exemption was the trustee and beneficiary, and maintained the property as the person's principal place of business, because this section invalidated any conveyance affecting entitlement to a homestead exemption in which a spouse did not join in the execution. *Fitton v. Bank of Little Rock*, 2010 Ark. 280, 365 S.W.3d 888 (2010).

Purchase Money.

A mortgage executed to secure money advanced to the mortgagor to pay for the

homestead is valid without joinder of the wife, being within the exception in this section. *Farnsworth v. Hoover*, 66 Ark. 367, 50 S.W. 865 (1899); *Sirman v. Sloss Realty Co.*, 198 Ark. 534, 129 S.W.2d 602 (1939).

Cited: *Oliver v. Routh*, 123 Ark. 189, 184 S.W. 843 (1916); *Sims v. McFadden*, 217 Ark. 810, 233 S.W.2d 375 (1950); *Childs v. Lambert*, 230 Ark. 366, 323 S.W.2d 564 (1959); *Ford v. Felts*, 3 Ark. App. 235, 624 S.W.2d 449 (1981); *Merchants & Planters Bank & Trust Co. v. Massey*, 302 Ark. 421, 790 S.W.2d 889 (1990); *Forrest Constr., Inc. v. Milam*, 345 Ark. 1, 43 S.W.3d 140 (2001).

18-12-404. Conveyance of interest of husband with mental illness and guardian appointed — Relinquishment of dower.

In all cases under § 20-47-103 whereunder a husband is duly adjudged to be with mental illness and a guardian appointed and wherein the guardian makes a sale of the husband’s interest in any of the real estate belonging to his ward, and the wife of the husband with mental illness is entitled to dower, it shall be sufficient to pass the dower interest of the wife, if she shall duly join in the petition of the guardian for the sale, and by separate instrument, duly acknowledged, convey all her interest in the lands.

History. Acts 1919, No. 325, § 1.

SUBCHAPTER 5 — POWER OF ATTORNEY

SECTION.	SECTION.
18-12-501. Acknowledgment and recording.	18-12-503. Relinquishment of dower, curtesy, and homestead rights.
18-12-502. Revocation.	

Cross References. Durable power of attorney, § 28-68-201 et seq.

Effective Dates. Acts 1939, No. 27, § 3: approved Jan. 31, 1939. Emergency clause provided: “It is hereby found and declared that many titles to lands, timber, oil and gas leases, and mineral rights, within the state of Arkansas are clouded, and that much confusion exists on account thereof, by reason of doubt as to the validity and effect of a married woman’s power of attorney to relinquish her dower and homestead rights in her husband’s land and as to the validity and effect of the act of her agent and attorney in fact in so relinquishing her dower and homestead according thereto, thus retarding development of the resources of the state in many instances, and an emergency is hereby declared to exist, and it being necessary for the preservation of public peace, health and safety, that this measure be-

come effective without delay; it shall take effect and be in force from and after its passage.”

Acts 1981, No. 714, § 75: Mar. 25, 1981. Emergency clause provided: “It has been found and is declared by the General Assembly of Arkansas that existing law relating to such matters as homestead, dower, curtesy, statutory allowances payable from a decedent’s estate, and the right of a surviving spouse to take against the will of a decedent, do not in all circumstances provide for equal treatment between the sexes, that the constitutionality of such existing law has been drawn into question by decisions of the United States Supreme Court and the Arkansas Supreme Court, and that there is an urgent need to insure that the law provides equality in the property rights and interests of married persons. Therefore, an emergency is declared to exist, and this

act being necessary for the preservation of the public peace, health and safety, shall

take effect and be in force from the date of its approval."

RESEARCH REFERENCES

ALR. Recovery of damages for breach of contract to convey homestead where only one spouse signed contract. 5 A.L.R.4th 1310.

Ark. L. Rev. Leflar, Liberty and Death: Advance Health Care Directives and the Law of Arkansas, 39 Ark. L. Rev. 375.

U. Ark. Little Rock L.J. Dicker, Symposium on Developmental Disabilities and the Law — Guardianship: Overcoming the Last Hurdle to Civil Rights for the Mentally Disabled, 4 U. Ark. Little Rock L.J. 485.

18-12-501. Acknowledgment and recording.

(a) Every letter of attorney, containing a power to convey any real estate as agent or attorney for the owner thereof or to execute as agent or attorney for another any deed or instrument in writing, that shall convey any real estate, or whereby any real estate shall be affected in law or equity, shall be acknowledged or proved and certified and recorded with any deed that the agent or attorney shall make in virtue of the letter of attorney.

(b) Letters of attorney shall be proved or acknowledged before the same courts or officers that are authorized by this act to take probate of deeds conveying real estate.

History. Rev. Stat., ch. 31, §§ 23, 24; C. & M. Dig., §§ 1527, 1528; Pope's Dig., §§ 1837, 1838; A.S.A. 1947, §§ 50-422, 50-423.

Meaning of "this act". Rev. Stat., ch. 31, codified as §§ 16-47-101, 16-47-103 —

16-47-106, 16-47-110, 18-12-101, 18-12-102, 18-12-104, 18-12-105, 18-12-201, 18-12-203 — 18-12-206, 18-12-209, 18-12-301, 18-12-402, 18-12-501, 18-12-502, 18-12-601 — 18-12-603.

CASE NOTES

ANALYSIS

In General.
Applicability.
Husband and Wife.
Recordation.

In General.

An agent's power to convey land for principal must possess the same requisites and observe the same solemnities as are necessary in a deed directly conveying the lands. *Less v. Manning*, 202 Ark. 138, 149 S.W.2d 40 (1941).

Applicability.

A petition for local improvement is not within this section. Board of Improv. Dist.

No. 5 v. Offenhauser, 84 Ark. 257, 105 S.W. 265 (1907).

Husband and Wife.

Husband, acting as agent for his wife, could not, without written power of attorney, convey her property so as to bind her. *Less v. Manning*, 202 Ark. 138, 149 S.W.2d 40 (1941).

Recordation.

Powers by which deeds are made must be recorded, or the record of the deed will not be notice to a subsequent purchaser from the party executing power. *Jones v. Green*, 41 Ark. 363 (1883).

Cited: *Greif Bros. Cooperage Corp. v. United States Gypsum Co.*, 341 F.2d 167 (8th Cir. 1965).

18-12-502. Revocation.

(a)(1) No letter of attorney, duly acknowledged or proved and certified as prescribed by this act, shall be revoked but by the maker of the letter of attorney or his or her legal representatives.

(2) The revocation shall be in writing acknowledged or proved before the proper court or officer and filed for record in the county or counties where the letter of attorney was intended to operate.

(b) All such letters of attorney shall be revoked and deemed void from the time of filing revocations for record.

History. Rev. Stat., ch. 31, § 25; C. & M. Dig., § 1529; Pope's Dig., § 1839; A.S.A. 1947, § 50-424. **Meaning of "this act".** See note to § 18-12-501.

18-12-503. Relinquishment of dower, curtesy, and homestead rights.

(a) By joining with his or her spouse in the execution of power of attorney, or by separate instrument, a married person may appoint an agent or attorney in fact and authorize him or her, for and in the person's name and stead, to relinquish all rights and possibility of dower, curtesy, and homestead to a spouse's grantee, lessee, or mortgagee in any lands, oil, gas, mineral, or timber and to execute for the person such relinquishment of dower, curtesy, and homestead in any oil and gas lease or assignment thereof, mineral deed, timber deed, royalty contract, mortgage, or contract for the sale of any land, timber, or minerals, or any interest therein, owned by a spouse and conveyed by the spouse to the grantee.

(b)(1) The act of an agent or attorney in fact, when authorized by properly executed and recorded power of attorney, in so relinquishing dower, curtesy, and homestead of a married person by joining in any deed, lease, conveyance of minerals, royalty contract, or other contract for the sale of any lands or lease of any lands for developing its minerals, or any interest therein, or the assignment of any oil and gas lease or interest therein shall be as effectual and binding as if the instrument or instruments had been executed in the first instance by the married person.

(2) The relinquishment by the attorney in fact may be by separate instrument or by the attorney in fact joining with the spouse in the execution of one (1) or more conveyances.

History. Acts 1939, No. 27, § 1; 1981, No. 714, § 7; A.S.A. 1947, § 50-425. prior powers of attorney authorizing relinquishment of dower and homestead rights, see Acts 1939, No. 27, § 2.

Publisher's Notes. As to validation of

CASE NOTES**Power of Attorney.**

Husband, acting as agent for his wife, could not, without written power of attor-

ney, convey her property so as to bind her. *Less v. Manning*, 202 Ark. 138, 149 S.W.2d 40 (1941).

SUBCHAPTER 6 — MISCELLANEOUS CONVEYANCES

SECTION.

- 18-12-601. After-acquired title.
 18-12-602. Land in adverse possession.
 18-12-603. Grants to two or more as tenancy in common.
 18-12-604. Deed to trustee or agent.
 18-12-605. Deeds of administrators, executors, guardians, commissioners, and sheriffs.

SECTION.

- 18-12-606. Deed or patent by Governor.
 18-12-607. Sales of real estate by defunct corporations ratified.
 18-12-608. Beneficiary deeds — Terms — Recording required.
 18-12-609. Marketability of real property sold at tax sales.

Effective Dates. Acts 1853, p. 207, § 3: effective on passage.

Acts 1919, No. 444, § 2: Mar. 27, 1919. Emergency declared.

Acts 1927, No. 224, § 2: approved Mar. 23, 1927. Emergency clause provided: "This act being necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared and all laws and parts of laws in conflict herewith are hereby repealed and this act shall take effect from and after its passage."

Acts 2005, No. 2270, § 2: Apr. 14, 2005. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the titles to real property rights purchased at delinquent tax sales are not marketable; that

the inability to receive marketable title to real property is an unreasonable alienation of real property and harmful to the economy; and that this act will permit the marketability of real property rights purchased at delinquent tax sales for the good of the state and its citizens. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

18-12-601. After-acquired title.

If any person shall convey any real estate by deed purporting to convey it in fee simple absolute, or any less estate, and shall not at the time of the conveyance have the legal estate in the lands, but shall afterwards acquire it, then the legal or equitable estate afterwards acquired shall immediately pass to the grantee and the conveyance shall be as valid as if the legal or equitable estate had been in the grantor at the time of the conveyance.

History. Rev. Stat., ch. 31, § 4; C. & M. Dig., § 1498; Pope's Dig., § 1798; A.S.A. 1947, § 50-404.

RESEARCH REFERENCES

Ark. L. Rev. Transmissibility of Certain Contingent Future Interests, 5 Ark. L. Rev. 111.

Estoppel to Assert an After Acquired Title in Arkansas, 17 Ark. L. Rev. 67.

CASE NOTES

ANALYSIS

Applicability.
Adverse Possession.
Constructive Trusts.
Delivery.
Easements.
Escrow.
Interest Passed.
Liens and Mortgages.
Mineral Rights.
Oil, Gas, and Mineral Rights.
Quitclaim Deeds.
Wills.

Applicability.

This section applies to conveyances made by corporations as well as individuals. *Jones v. Green*, 41 Ark. 363 (1883).

This section refers only to the voluntary sales of the person to be bound. *Horsley v. Hilburn*, 44 Ark. 458 (1884).

As the mortgage is, as at common law, the conveyance of a conditional estate, and this section applies to any conveyance purporting to convey a fee simple or less estate, the provisions must apply to mortgages equally as to conveyances absolute in form. *Kline v. Ragland*, 47 Ark. 111, 14 S.W. 474 (1886).

This section does not apply to conveyances made by state. *St. Louis Refrigerator & Wooden Gutter Co. v. Langley*, 66 Ark. 48, 51 S.W. 68 (1898).

This section is applicable to conveyance by deed of trust made by contingent remainderman. *Jernigan v. Daughtry*, 194 Ark. 623, 109 S.W.2d 126 (1937).

Although creditor banks argued that their *lis pendens* filings and quitclaim deeds given to debtor by her relatives related back to prior transfers and operated to perfect their interests in the properties prior to the preference period, because the bankruptcy court found that the *lis pendens* filings and quitclaim deeds were avoidable preferences under 11 U.S.C.S. § 547(b), the doctrine of after-acquired title was not effective to secure

the banks' interests, if any, in the properties; moreover, the facts did not involve the simple defective acknowledgment of a mortgage, but rather, the entities that mortgaged these properties to the banks in fact had no legal interest in the properties themselves. *Rice v. First Ark. Valley Bank (In re May)*, 310 B.R. 405 (Bankr. E.D. Ark. 2004).

The common law doctrine of after-acquired title, codified in this section, did not apply to a case of a foundation and its representative granting a life estate to a grantee in property which the grantors did not own and did not later acquire. *Jackson v. Smith*, 2010 Ark. App. 681, 380 S.W.3d 443 (2010).

Adverse Possession.

An after-acquired title inures to the benefit of the grantee and all subsequent grantees who are presumed to hold under such title unless adverse occupancy is shown independent of that chain of title. *Grayson-McLeod Lumber Co. v. Duke*, 160 Ark. 76, 254 S.W. 350 (1923).

Constructive Trusts.

Where a purchaser of land conveyed the land by warranty deed, without paying the purchase money notes, and subsequently purchased the land on foreclosure of the vendor's lien, he became trustee for those deraigning title under him. *Lewis v. Bush*, 171 Ark. 192, 283 S.W. 377 (1926).

Delivery.

For a deed to take effect as a conveyance of an after-acquired title, there must be an irrevocable delivery. *Rogers v. Snow Bros. Hdwe. Co.*, 186 Ark. 183, 52 S.W.2d 969 (1932).

Easements.

Where property owners granted a right-of-way to a gas company across a lot which they did not own, the subsequent acquisition of the north lot by the grantors immediately gave the gas company a right-of-way across the lot. *Hatfield v. Arkansas W. Gas Co.*, 5 Ark. App. 26, 632 S.W.2d 238 (1982).

Escrow.

Merely by the delivery of the deed into escrow, the vendees obtained no interest in the property until they fulfilled the conditions of the escrow agreement and contract; the doctrine of after-acquired title requires a conveyance. *White v. Cordes*, 14 Ark. App. 104, 685 S.W.2d 524 (1985).

Interest Passed.

Where a grantor of land belonging to the state subsequently purchased it from the state and received certificates of entry which entitled him to a patent when the state's title should be confirmed, he acquired an equitable title which inured to the benefit of his grantee. *Rozell v. Chicago Mill & Lumber Co.*, 76 Ark. 525, 89 S.W. 469 (1905); *Osceola Land Co. v. Chicago Mill & Lumber Co.*, 84 Ark. 1, 103 S.W. 609 (1907).

Title acquired at a tax sale subsequent to the execution of a warranty deed to the land so purchased will pass to the grantee. *Tupy v. Kocourek*, 66 Ark. 433, 51 S.W. 69 (1899); *Fox v. Three States Lumber Co.*, 85 Ark. 497, 108 S.W. 1137 (1908).

Where a grantor attempts to convey a greater estate in lands than he has a right and title to at the time of conveyance, then an after-acquired title passes to the grantee, but no greater estate than was attempted to be passed in the first conveyance. *Henry v. Gulf Ref. Co.*, 176 Ark. 133, 2 S.W.2d 687 (1927); *Henry v. Gulf Ref. Co.*, 179 Ark. 138, 15 S.W.2d 979 (1929).

Where deed purported to convey lands in fee simple absolute, although there was no warranty of title, any interest which grantor may have since acquired by inheritance or otherwise passed under the deed. *DeLay v. Bond*, 206 Ark. 762, 177 S.W.2d 772 (1942).

Conveyance by life tenant of "entire interest" in land also warranting "the title to my interest" was effective to transfer any alienable interest that life tenant may have had in the land. *Hutchison v. Sheppard*, 225 Ark. 14, 279 S.W.2d 33 (1955).

Where husband and wife conveyed property held by entirety to his sister, if the widow regained title after husband's death, it would have reverted to husband's sister under this section. *Ellis v. Ashby*, 227 Ark. 479, 299 S.W.2d 206 (1957).

Where deed contained covenants of general warranty, it would pass any rights

grantors might then have and might thereafter have acquired in any part of the entire tract. *Rose Lawn Cem. Ass'n v. Scott*, 229 Ark. 639, 317 S.W.2d 265 (1958).

Liens and Mortgages.

If, between the date of the conveyance of real estate by a grantor who has no title or an imperfect title and the subsequent acquisition of perfect title, a judgment is rendered against the grantor, the title of the grantee is prior to the lien of the judgment. *Watkins v. Wassell*, 15 Ark. 73 (1854).

A title acquired after the execution of a mortgage inures to the mortgagee's benefit. *Kline v. Ragland*, 47 Ark. 111, 14 S.W. 474 (1886); *Broadway v. Sidway*, 84 Ark. 527, 107 S.W. 163 (1907).

One who, after executing a mortgage on a tract of land owned by another, acquired the interest of a mortgagee from the true owner, did not acquire such an interest in the land as would pass under this section as its value was dependent upon the debt and became worthless when the debt was paid. *Turman v. Sanford*, 69 Ark. 95, 61 S.W. 167 (1901).

Where one, intending to purchase certain lands, executes a mortgage to secure money with which to pay for it, but which money is not furnished, he may later mortgage the same land to another for the same purpose who, on furnishing the money, secures a lien on the land superior to the first mortgage, even though the first mortgage was recorded. *Faulkner County Bank & Trust Co. v. Vail*, 173 Ark. 406, 293 S.W. 40 (1927).

It would be a violation of the spirit of this section to permit mortgagor to acquire title from a prior mortgagee who had bought the land after sale under such mortgage, and then defeat the payment or hold that the land was not subject to the lien of the second mortgage. *Stone v. Morris*, 177 Ark. 745, 7 S.W.2d 796 (1928).

Where a husband and wife gave a bank a mortgage which was recorded, then construction began on a house on that lot, and finally the couple recorded their own deed on the land, the mortgage had priority over the materialmen's liens since title was in another at the time the materialmen's liens attached and no such lien could exist absent a valid contract with the landowner at the time of delivery,

whereas title could relate back for the purposes of the mortgage. *Katterjohn Concrete Prods., Inc. v. Coffman*, 264 Ark. 503, 573 S.W.2d 306 (1978).

Mineral Rights.

Where widow executed warranty deed as her son's guardian conveying mineral rights in which she had only a life estate, title which she had attempted to convey and warrant passed to her grantee and his successors in interest when she acquired her son's interest by quitclaim deed after he became of age. *Sheppard v. Zeppa*, 199 Ark. 1, 133 S.W.2d 860 (1939).

Where owner of mortgaged land executed mineral deeds, each containing a covenant of general warranty, and thereafter the mortgage was foreclosed in suit which cut off rights of junior title claimants, and two years thereafter such owner reacquired the property, he was estopped from disputing the validity of the mineral conveyances which he executed. *Hayes v. Coats*, 218 Ark. 678, 238 S.W.2d 935 (1951).

Where husband and wife executed deeds to mineral interests in mortgaged property, although wife had only an inchoate interest therein, and later after death of husband, the mortgage was foreclosed in proceedings in which the mineral rights owners were not made parties, and the purchaser at the foreclosure sale conveyed an interest in the property to the wife, the title so acquired by the wife, as to the mineral interests passed to the purchasers under the previous mineral deeds. *Robertson v. Griffin*, 227 Ark. 969, 302 S.W.2d 773 (1957).

This section did not convey plaintiffs the mineral rights they alleged they obtained from defendant two in 2003, which had been conveyed to defendant two by defendant one in 1997, when the rights were conveyed to defendant one in 2004 as the deeds had been reformed deeds and related back to their original execution, and there was no mineral title to pass under this section. *Mauldin v. Snowden*, 2011 Ark. App. 630, 386 S.W.3d 560 (2011).

In a case involving the mineral rights to 220 acres of property, reformation of a warranty deed for the surface estate was proper based on mutual mistake because the deed failed to properly include a reservation of the mineral interest. There

was no need to reform all of the deeds and conveyances subsequent to the conveyance at issue because, once that deed was reformed, there was no evidence that any of the deeds were not as intended by the parties to those deeds, and, because of the reformation, there were no mineral interests to pass under the after-acquired title statute. *Longing Family Revocable Trust v. Snowden*, 2013 Ark. App. 81, 426 S.W.3d 488 (2013).

Oil, Gas, and Mineral Rights.

Ruling in favor of a corporation that the decedent's wife did not hold title to the land or mineral rights at issue was proper because she possessed only a dower interest under § 28-11-301 at the time of the 1986 deed and the after-acquired title doctrine barred her from asserting a claim to the property. At most, she had only a dower interest in the oil, gas, and mineral rights reserved by her husband in the 1986 deed and even if the deed had specifically limited her conveyance to her actual interest at the time, that interest was inchoate when the deed was executed. *Evans v. SEECO, Inc.*, 2011 Ark. App. 739 (2011).

Quitclaim Deeds.

A quitclaim deed is insufficient to convey after-acquired title. *Wells v. Chase*, 76 Ark. 417, 88 S.W. 1030 (1905); *Holmes v. Countiss*, 195 Ark. 1014, 115 S.W.2d 553 (1938); *Union Trust Co. v. Watts*, 201 Ark. 1011, 148 S.W.2d 318 (1941).

A quitclaim deed, for a substantial consideration, purporting to convey all interest in the land "present or prospective" of a contingent remainderman, upon the death of the life tenant became fully effective to transfer title. *Bradley Lumber Co. v. Burbridge*, 213 Ark. 165, 210 S.W.2d 284 (1948).

Where husband and wife were in possession of real estate by a deed with a faulty description as tenants by entirety and the husband deeded his interest to wife, and later acquired a quitclaim deed in his name to correct the description, the after-acquired title immediately vested title in wife. *Hayes v. Gordon*, 217 Ark. 18, 228 S.W.2d 464 (1950).

Wills.

Although this section refers to conveyances by deed, devises were always regarded as a mode of conveyance, and af-

ter-acquired property will be conveyed by a will. *Patty v. Goolsby*, 51 Ark. 61, 9 S.W. 846 (1888). (But see § 18-12-101 and notes thereto.).

Cited: *Cocke v. Brogan*, 5 Ark. 693 (1844); *Shreve v. Carter*, 177 Ark. 815, 8 S.W.2d 443 (1928); *Levins v. Edwards*, 228 Ark. 1111, 312 S.W.2d 447 (1958).

18-12-602. Land in adverse possession.

Any person claiming title to any real estate, notwithstanding there may be an adverse possession thereof, may sell and convey his or her interest in the same manner and with like effect as if he or she were in the actual possession of the real estate.

History. Rev. Stat., ch. 31, § 6; C. & M. Dig., § 1500; Pope's Dig., § 1809; A.S.A. 1947, § 50-408.

RESEARCH REFERENCES

Ark. L. Rev. The New Arkansas Inheritance Laws: A Step into the Present with an Eye to the Future, 23 Ark. L. Rev. 313.

CASE NOTES

Multiple Conveyances.

Under this section, where one who has conveyed his property while an infant, executes after his arrival at majority another deed conveying the property to another person, the first deed is thereby disaffirmed. *Beauchamp v. Bertig*, 90 Ark. 351, 119 S.W. 75 (1909).

If the grantee breaches a condition subsequent, the grantor, by virtue of this section, can effect a forfeiture of the condition by conveying to another. *Moore v. Sharpe*, 91 Ark. 407, 121 S.W. 341 (1909).

18-12-603. Grants to two or more as tenancy in common.

Every interest in real estate granted or devised to two (2) or more persons, other than executors and trustees as such, shall be in tenancy in common unless expressly declared in the grant or devise to be a joint tenancy.

History. Rev. Stat., ch. 31, § 9; C. & M. Dig., § 1503; Pope's Dig., § 1812; A.S.A. 1947, § 50-411.

RESEARCH REFERENCES

Ark. L. Rev. Gift and Estate Tax Consequences of Arkansas Cotenancies, 7 Ark. L. Rev. 237.

Recent Developments: Property: Effect of Illegal Marriage on Purported Tenancy by Entirety, 32 Ark. L. Rev. 823.

CASE NOTES

ANALYSIS

Children as Cotenants.

Joint Tenancy.

—Tenancy by Entirety.

Tenancy in Common.

Children as Cotenants.

Where a testator devises land to his children, they become tenants in common. *Lester v. Kirtley*, 83 Ark. 554, 104 S.W. 213 (1907).

When a father died intestate as the owner of the lands, the title descended to his five children who became cotenants, and the mere lapse of time did not dissolve the cotenancy. *Griffin v. Solomon*, 235 Ark. 909, 362 S.W.2d 707 (1962).

Devise to children and their bodily heirs held to create fee tails in common with contingent remainder in bodily heirs. *Mitchell v. Mitchell*, 263 Ark. 365, 565 S.W.2d 29 (1978).

Joint Tenancy.

This section does not prohibit a joint tenancy; it merely provides for a construction against joint tenancy if the intention to create it is not clear. *Ferrell v. Holland*, 205 Ark. 523, 169 S.W.2d 643 (1943); *Mitchell v. Mitchell*, 263 Ark. 365, 565 S.W.2d 29 (1978).

Trial court's reliance upon this section was unnecessary where the deed at issue was clear and unambiguous in creating a joint tenancy with right of survivorship. *Tripp v. Miller*, 82 Ark. App. 236, 105 S.W.3d 804 (2003).

—Tenancy by Entirety.

Where a conveyance is to a husband and wife, they take an estate of entirety, and survivorship still obtains. *Robinson v. Eagle*, 29 Ark. 202 (1874); *Branch v. Polk*, 61 Ark. 388, 33 S.W. 424 (1895); *Simpson v. Biffle*, 63 Ark. 289, 38 S.W. 345 (1896);

Davies v. Johnson, 124 Ark. 390, 187 S.W. 323 (1916).

Although defendant and deceased had been bigamously married, a deed which identified them as "husband and wife" and described their interest as that of "tenants by entirety" succeeded in meeting the requirements of this section for a joint tenancy. *Wood v. Wood*, 264 Ark. 304, 571 S.W.2d 84 (1978).

Deeds to man and wife created no right of survivorship, which would have existed in a tenancy by the entirety, where the persons named as grantees were not, in fact, married, and no words otherwise expressed a right of survivorship. *Smith v. Stewart*, 268 Ark. 766, 596 S.W.2d 346, aff'd, 269 Ark. 363, 601 S.W.2d 837 (1980).

Where the relevant language of an instrument granting title clearly separated the parties into four groups, including two married couples and then stated that the grantees took as tenants in common, each of the four groups had an undivided one-fourth interest in the land conveyed, but the married couples held their interests by the entirety; this section could only control, resulting in tenancies in common, if the grantor had not granted the two married couples their interest by the entirety. *Shinn v. Shinn*, 274 Ark. 237, 623 S.W.2d 526 (1981).

Tenancy in Common.

The language of a deed from a mother to her three children, which conveyed the property "jointly and severally, and unto their heirs, assigns and successors forever," was insufficient to overcome the statutory presumption of a tenancy in common. *James v. Taylor*, 62 Ark. App. 130, 969 S.W.2d 672 (1998).

Cited: *United States v. 48.9 Acres of Land*, 85 F. Supp. 133 (W.D. Ark. 1949); *Metropolitan Life Ins. Co. v. Gardner*, 245 Ark. 742, 434 S.W.2d 266 (1968).

18-12-604. Deed to trustee or agent.

(a)(1) The appearance of the words "trustee", "as trustee", or "agent" following the names of the grantee in any deed of conveyance of land executed, without other language showing a trust, shall not be deemed to give notice to, or put on inquiry, any person dealing with the land that a trust or agency exists or that there are other beneficiaries of the conveyance except the grantee named therein.

(2) The conveyance shall vest the title to the land in the grantee.

(b) A conveyance of land by the grantee, whether followed by the words "trustee", "as trustee", or "agent" or not, shall vest title in his or her grantee free from any claims of all persons or corporations.

History. Acts 1919, No. 444, § 1; C. & M. Dig., § 1504; Pope's Dig., § 1813; A.S.A. 1947, § 50-412.

CASE NOTES

Cited: Greif Bros. Cooperage Corp. v. Wood, 264 Ark. 505, 573 S.W.2d 307 (1978); Coleman v. Coleman, 59 Ark. App. 196, 955 S.W.2d 713 (1997).
United States Gypsum Co., 341 F.2d 167 (8th Cir. 1965); Hill v. Hopkins, 198 Ark. 1049, 133 S.W.2d 634 (1939); Bottenfield v.

18-12-605. Deeds of administrators, executors, guardians, commissioners, and sheriffs.

(a)(1) All deeds of conveyance made by an administrator, an executor, a guardian, or a commissioner, deeds of real estate sold under an execution made and executed by a sheriff, and deeds made and executed by a trustee or an attorney pursuant to a foreclosure of a deed of trust or mortgage, duly made and executed, acknowledged, and recorded, as now required by law and purporting to convey real estate, shall vest in the grantee and his or her heirs and assigns a good and valid title, both in law and in equity.

(2)(A) The deeds shall be evidence of the facts recited in the deeds and of the legality and regularity of the sale of the real estate so conveyed.

(B) However, the deeds do not warrant title to a subsequent grantee, and any subsequent grantee may not assert or claim any warranty of title deriving from the deeds.

(b) Nothing in this section shall prohibit a deed made under subdivision (a)(1) of this section from warranting title by express use of warranty language.

(c) Every deed so made, executed, acknowledged, and recorded, or a certified copy of the deed, under the seal of the recorder of the proper county shall be received in evidence in any court in this state without further proof of its execution.

History. Acts 1853, §§ 1, 2, p. 207; C. & M. Dig., §§ 1534, 1535; Pope's Dig., §§ 1844, 1845; A.S.A. 1947, §§ 50-419, 50-420; Acts 2005, No. 1884, § 1.

RESEARCH REFERENCES

Ark. L. Rev. The Best Evidence Rule — Writing to Prove the Writing's Contents, A Rule Requiring the Production of a 14 Ark. L. Rev. 153.

CASE NOTES

ANALYSIS

Commissioner's Deed.
 Sheriff's Deed.
 Tax Sales.

Commissioner's Deed.

A deed from one styled the receiver of an estate and as commissioner, who was in fact a commissioner, is evidence of the facts recited therein. *Kelley v. Laconia Levee Dist.*, 74 Ark. 201, 74 Ark. 202, 85 S.W. 249, 87 S.W. 638, amended, 74 Ark. 209, 87 S.W. 638 (1905).

Sheriff's Deed.

A sheriff's deed, though prima facie evidence of the facts recited, permits a party to put the recitals in issue and go behind the deed and show their falsity, and where

their falsity is shown, being public records, it effects the sufficiency of the deed and all concerned with notice. *Hughes v. Watt*, 26 Ark. 228 (1870).

A deed duly executed and acknowledged by a sheriff and recorded is evidence that the sale was regularly made, without proof that the sale was confirmed by the court. *Winfrey v. People's Sav. Bank*, 176 Ark. 941, 5 S.W.2d 360 (1928).

Tax Sales.

A defendant in a suit to quiet title, who was not in possession and had lost title at a tax foreclosure sale, could not question the apparent and prima facie title acquired by the plaintiff by purchase at that sale. *Hornor v. Jarrett*, 99 Ark. 154, 137 S.W. 820 (1911); *Walsh v. Certain Lands*, 209 Ark. 320, 190 S.W.2d 447 (1945).

18-12-606. Deed or patent by Governor.

(a) In all cases in which, by the laws of this state, the Governor is required to execute any deed of conveyance or patent for any lands sold or granted by the state, the deed of conveyance or patent, when executed by the Governor and countersigned by the Secretary of State, and when the seal of the state shall be affixed thereto, shall convey all the right and title of the state in and to the lands to the purchaser.

(b)(1) The deed may be recorded in the office of the recorder of the proper county and shall have the same effect as evidence.

(2) A duly certified transcript of the deed or patent taken from the record thereof shall have the same effect as evidence in all the courts in this state as if the deed or patent had been acknowledged and recorded under the existing laws of this state.

History. Acts 1850, § 1, p. 65; C. & M. Dig., § 1533; Pope's Dig., § 1843; A.S.A. 1947, § 50-421.

Publisher's Notes. The power to dis-

pose of state lands is now vested in the Commissioner of State Lands pursuant to § 22-5-206.

CASE NOTES

Recitals.

The Commissioner of State Lands is not required to make any recitals in his deeds to lands forfeited for taxes. They convey whatever title the state has without recitals. *Walker v. Taylor*, 43 Ark. 543 (1884).

Recitals in a patent to swamp lands are presumed to be true till the contrary appears. *Dawson v. Parham*, 55 Ark. 286, 18 S.W. 48 (1892).

18-12-607. Sales of real estate by defunct corporations ratified.

(a) All sales of real estate which was the property of any corporation organized under the laws of the State of Arkansas, when the corporation has expired or ceased to exist, either by limitations, judgment of court, forfeiture of its charter, legislative act, or by surrender of charter, are ratified and declared to be binding and to pass to the purchaser at the sales all the right, title, and interest the corporation has in the real estate at the time of its dissolution and to pass to the purchaser all the right, title, and interest in the State of Arkansas, as trustee, as now provided by law.

(b)(1) The deed of conveyance shall have been executed by the proper officers of the corporation at the time of its dissolution or, in the event of their death, absence from the state, or inability to act, the resident stockholders of the corporation shall have a right to select a president and secretary for the purpose of executing and delivering the deed of conveyance.

(2) When so executed, the deed shall have the same force and effect as if executed by the proper officers of the corporation prior to the dissolution thereof.

History. Acts 1927, No. 224, § 1; Pope's Dig., § 1865; A.S.A. 1947, § 50-426.

18-12-608. Beneficiary deeds — Terms — Recording required.

(a)(1)(A) A beneficiary deed is a deed without current tangible consideration that conveys upon the death of the owner an ownership interest in real property other than a leasehold or lien interest to a grantee designated by the owner and that expressly states that the deed is not to take effect until the death of the owner.

(B)(i) A beneficiary deed transfers the interest to the designated grantee effective upon the death of the owner, subject to:

(a) All conveyances, assignments, contracts, leases, mortgages, deeds of trust, liens, security pledges, oil, gas, or mineral leases, and other encumbrances made by the owner or to which the real property was subject at the time of the owner's death, whether or not the conveyance or encumbrance was created before or after the execution of the beneficiary deed; and

(b) A claim for reimbursement of federal or state benefits by the Department of Human Services from the estate of the grantor or the interest acquired by a grantee of the beneficiary deed under § 20-76-436.

(ii) No legal or equitable interest shall vest in the grantee until the death of the owner prior to revocation of the beneficiary deed.

(2)(A) The owner may designate multiple grantees under a beneficiary deed.

(B) Multiple grantees may be joint tenants with right of survivorship, tenants in common, holders of a tenancy by the entirety, or any other tenancy that is otherwise valid under the laws of this state.

(3)(A) The owner may designate one (1) or more successor grantees, including one (1) or more unnamed heirs of the original grantee or grantees, under a beneficiary deed.

(B) The condition upon which the interest of a successor grantee vests, such as the failure of the original grantee to survive the grantor, shall be included in the beneficiary deed.

(b)(1) If real property is owned as a tenancy by the entirety or as a joint tenancy with the right of survivorship, a beneficiary deed that conveys an interest in the real property to a grantee designated by all of the then surviving owners and that expressly states the beneficiary deed is not to take effect until the death of the last surviving owner transfers the interest to the designated grantee effective upon the death of the last surviving owner.

(2)(A) If a beneficiary deed is executed by fewer than all of the owners of real property owned as a tenancy by the entirety or as joint tenants with right of survivorship, the beneficiary deed is valid if the last surviving owner is a person who executed the beneficiary deed.

(B) If the last surviving owner did not execute the beneficiary deed, the beneficiary deed is invalid.

(c)(1) A beneficiary deed is valid only if the beneficiary deed is recorded before the death of the owner or the last surviving owner as provided by law in the office of the county recorder of the county in which the real property is located.

(2) A beneficiary deed may be used to transfer an interest in real property to a trustee of a trust estate even if the trust is revocable and may include one (1) or more unnamed successor trustees as successor grantees.

(d)(1) A beneficiary deed may be revoked at any time by the owner or, if there is more than one (1) owner, by any of the owners who executed the beneficiary deed.

(2) To be effective, the revocation shall be:

(A) Executed before the death of the owner who executes the revocation; and

(B) Recorded in the office of the county recorder of the county in which the real property is located before the death of the owner as provided by law.

(3) If the revocation is not executed by all the owners, the revocation is not effective unless executed by the last surviving owner and recorded before the death of the last surviving owner.

(4) A beneficiary deed that complies with this section may not be revoked, altered, or amended by the provisions of the owner's will.

(e) If an owner executes more than one (1) beneficiary deed concerning the same real property, the recorded beneficiary deed that is last signed before the owner's death is the effective beneficiary deed, regardless of the sequence of recording.

(f)(1) This section does not prohibit other methods of conveying real property that are permitted by law and that have the effect of postponing enjoyment of an interest in real property until the death of the owner.

(2) This section does not invalidate any deed otherwise effective by law to convey title to the interests and estates provided in the deed that is not recorded until after the death of the owner.

(g) A beneficiary deed is sufficient if it complies with other applicable laws and if it is in substantially the following form:

“Beneficiary Deed

CAUTION: THIS DEED MUST BE RECORDED PRIOR TO THE DEATH OF THE GRANTOR IN ORDER TO BE EFFECTIVE.

KNOW ALL PERSONS BY THESE PRESENTS THAT:

For a non-monetary, intangible consideration, of value to the Grantor, I (we) hereby convey to _____ (grantee) effective on my (our) death the following described real property:

(Legal description)

(Signature of grantor(s))
(acknowledgment)”

(h) The instrument of revocation shall be sufficient if it complies with other applicable laws and is in substantially the following form:

“Revocation of Beneficiary Deed

CAUTION: THIS REVOCATION MUST BE RECORDED PRIOR TO THE DEATH OF THE GRANTOR IN ORDER TO BE EFFECTIVE.

The undersigned hereby revokes the beneficiary deed recorded on _____ (date), in docket or book _____ at page _____, or instrument number _____, records of _____ County, Arkansas.

Dated: _____

Signature
(acknowledgment)”

History.

Acts 2005, No. 1918, § 1; 2007, No. 243, § 1.

RESEARCH REFERENCES

Ark. L. Rev. Bryan Malloy, Case Note: Minor Fix or Major Pain: The Impact of Fitton v. Bank of Little Rock on Arkansas’s Homestead Exemption, 66 Ark. L. Rev. 577 (2013).

U. Ark. Little Rock L. Rev. Well, Now, Ain’t That Just Fugacious!: A Basic Primer on Arkansas Oil and Gas Law, 29 U. Ark. Little Rock L. Rev. 211.

18-12-609. Marketability of real property sold at tax sales.

(a) The title to any real property located within the State of Arkansas based upon a deed resulting from a delinquent tax sale is marketable if:

- (1) The tax deed has been of record for more than fifteen (15) years;
- (2) Any taxes due have been paid by the tax deed grantee or the heirs or successors of the tax deed grantee for more than fifteen (15) years;
- (3) No claim of adverse possession of the real property has been asserted or filed of record since the recording of the tax deed; and
- (4) The taxes for which the tax deed was issued had not been paid before the tax deed was executed and delivered to the tax deed grantee.

(b) This section shall not be subject to the additional time to challenge a tax deed given to minors, persons suffering a mental incapacity, or persons serving in the United States Armed Forces during a time of war under § 26-37-203(b).

(c)(1) Nothing in this section shall preclude a judicial action to confirm a tax sale or quiet the title to any real property located within this state prior to the time that the title to the real property is considered marketable under subsection (a) of this section.

(2) A judicial action to confirm the tax sale or quiet title to real property located in this state eliminates any additional time to redeem the real property or challenge a tax deed under § 26-37-203 or § 26-37-305.

(d) This section shall not apply to a tax sale of a severed mineral interest.

History. Acts 2005, No. 2270, § 1; added the (c)(1) designation; inserted 2015, No. 683, § 1. “confirm a tax sale or” in (c)(1); and added

Amendments. The 2015 amendment (c)(2).

**SUBCHAPTER 7 — DISBURSEMENT OF FUNDS AS PART OF REAL ESTATE
CLOSING AND SETTLEMENT SERVICES ACT**

SECTION.

18-12-701. Title.

18-12-702. Definitions.

18-12-703. Closing and settlement ser-

vices — Disbursement of
funds — Penalties.

18-12-701. Title.

This subchapter shall be known and may be cited as the “Disbursement of Funds as Part of Real Estate Closing and Settlement Services Act”.

History. Acts 1991, No. 1110, § 1.

18-12-702. Definitions.

As used in this subchapter:

(1) “Available for immediate withdrawal as a matter of right” means the following:

(A) For any item or draft, when the item or draft has been submitted for collection and payment received; and

(B) For any deposited item or draft, when final settlement has occurred;

(2) "Closing and settlement services" means those services which benefit the parties to the sale, lease, encumbrance, mortgage, or creation of a secured interest in and to real property, and the receipt and disbursement of money in connection with any sale, lease, encumbrance, mortgage, or deed of trust; and

(3) "Financial institution" means an entity that is authorized under the laws of this state, another state, or the United States of America to make loans and receive deposits and has its deposits insured by the Federal Deposit Insurance Corporation or the National Credit Union Share Insurance Fund.

History. Acts 1991, No. 1110, § 1.

18-12-703. Closing and settlement services — Disbursement of funds — Penalties.

(a)(1) No person, firm, partnership, corporation, or other entity that provides closing and settlement services for a real estate transaction shall disburse funds as a part of such services until those funds have been received and are available for immediate withdrawal as a matter of right from the financial institution in which the funds have been deposited.

(2) However, the person, firm, partnership, corporation, or other entity providing closing and settlement services may advance funds, not to exceed five hundred dollars (\$500), on behalf of interested parties for the transaction, to pay incidental fees and charges pertaining to the closing and settlement of the transaction.

(b) Any person, firm, partnership, corporation, or other entity who knowingly and willfully violates the provisions of this subchapter shall be guilty of a Class A misdemeanor.

(c) In addition to the criminal penalty imposed by this section, the prosecuting attorneys of this state shall have the authority to file a petition in circuit court in any county in which a violation of the provisions of this subchapter occurred, for civil enforcement of the provisions of this subchapter by seeking an injunction prohibiting any person, firm, partnership, corporation, or other entity from disbursing funds in violation of this subchapter.

History. Acts 1991, No. 1110, § 1.

Cross References. Fines, § 5-4-201.

Imprisonment, § 5-4-401.

CHAPTER 13

HORIZONTAL PROPERTY ACT

SECTION.

- 18-13-101. Title.
- 18-13-102. Definitions.
- 18-13-103. Establishment of horizontal property regimes.
- 18-13-104. Master deed.
- 18-13-105. Plans to be attached to master deed.
- 18-13-106. Additional units in excess of those described in master deed.
- 18-13-107. Waiver and reestablishment of regimes.
- 18-13-108. Bylaws.
- 18-13-109. Modification of administration.
- 18-13-110. Book of receipts and expenditures — Examination.

SECTION.

- 18-13-111. Status of individual units.
- 18-13-112. Ownership and valuation of separate units and common elements.
- 18-13-113. Types of joint ownership.
- 18-13-114. Common elements.
- 18-13-115. Conveyances.
- 18-13-116. Liability for expenses and assessments.
- 18-13-117. Insurance generally.
- 18-13-118. Application of insurance proceeds to reconstruction.
- 18-13-119. Sharing of reconstruction costs when building not insured or indemnity insufficient.
- 18-13-120. Taxation.

Effective Dates. Acts 1961 (1st Ex. Sess.), No. 60, § 25: Sept. 14, 1961. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that there is an urgent need to make available housing and business locations to those persons in this State who live in areas where land costs make it impossible for them to acquire single family homes or single unit business locations and where current rentals are beyond their economic reach; that construction and development of housing and business locations for such persons cannot be undertaken by private industry for lack of legislation enabling single units in multi-unit structures to qualify for federally insured loans; and that enactment of this bill will provide such legislation, and will make such housing and business locations available. Therefore, an emergency is declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

Acts 1969, No. 216, § 3: Mar. 10, 1969. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is a pressing need for the construction of additional housing and business locations at a cost that is within

the reach of every individual and business in this State; that the cost of real estate has risen so rapidly that it is impossible for persons or businesses to purchase such real estate and construct houses and buildings; that the 'Horizontal Property Act' as originally written contemplated that an 'apartment' be confined to one building; that it is necessary that an apartment within the meaning of this Act extend to two or more buildings; and that in order to encourage the construction of additional units for residential, business and other purposes, it is necessary that this Act become effective immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1975, No. 731, § 8: Apr. 3, 1975. Emergency clause provided: "It is hereby found and determined by the General Assembly that legal questions have arisen concerning the proper interpretation of Act 60 of the First Extraordinary Session of 1961 which have interfered with its use and which will be clarified and answered by the passage of this amendatory Act. Therefore, an emergency is hereby declared to exist and this Act being neces-

sary for the immediate preservation of the public peace, health, and safety, shall be

in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Formation, composition, and powers of governing body of condominium association: construction of contractual provisions regarding. 13 A.L.R.4th 598.

Statutes, bylaws, or regulations restricting sale, transfer, or lease of condominium units. 17 A.L.R.4th 1247.

Law regulating conversion of rental housing to condominiums. 21 A.L.R.4th 1083.

Guidelines relating to condominium association's requisite approval of individual unit owner's improvements or decorations. 25 A.L.R.4th 1059.

Statutes, bylaws, or regulations restricting number of condominium units that may be owned by single individual or entity. 39 A.L.R.4th 88.

Personal liability of owner of condominium unit to one sustaining personal injury or property damage by condition of common areas. 39 A.L.R.4th 98.

Liability of owner of unit in condominium, recreational development, time share property, or the like, for assessment in support of common facilities levied against and unpaid by prior owner. 39

A.L.R.4th 114.

Condominium owner's covenant to pay dues or fees to sports or recreational facility. 39 A.L.R.4th 129.

Right of condominium association's management or governing body to inspect individual units. 41 A.L.R.4th 730.

Am. Jur. 15B Am. Jur. 2d, Condomin., § 1 et seq.

Ark. L. Rev. Legislation — No. 60 — Horizontal Property Act — The Concept of Condominium, 15 Ark. L. Rev. 430.

Securities Regulation of Real Estate Programs, 27 Ark. L. Rev. 651.

U. Ark. Little Rock L.J. Wright, Zoning Law in Arkansas: A Comparative Analysis, 3 U. Ark. Little Rock L.J. 421.

Note, Property — Real Covenants — Homeowners' Associations: A Lease Will Not Convey Rights in Common Properties, Hannum v. Bella Vista Village Property Owners Association, 272 Ark. 49, 611 S.W.2d 756 (1981), 4 U. Ark. Little Rock L.J. 565.

Survey — Miscellaneous, 12 U. Ark. Little Rock L.J. 219.

18-13-101. Title.

This chapter shall be known as the "Horizontal Property Act".

History. Acts 1961 (1st Ex. Sess.), No. 60, § 1; A.S.A. 1947, § 50-1001.

CASE NOTES

Cited: Heritage Bay Property Regime v. Jenkins, 27 Ark. App. 112, 766 S.W.2d 624 (1989).

18-13-102. Definitions.

As used in this chapter:

(1) "Apartment" means a part of the property intended for residential, commercial, industrial, or any other type of independent use consisting of one (1) or more rooms or spaces occupying all or part of one (1) or more floors in a building or buildings of one (1) or more floors

designated as an apartment in the master deed and delineated on the plans provided for in § 18-13-105;

(2) "Co-owner" means a person, firm, corporation, partnership, association, trust, or other legal entity, or any combination thereof, who owns an apartment within the building;

(3)(A) "Council of co-owners" means all the co-owners as defined in subdivision (2) of this section.

(B) However, except as otherwise provided in this chapter, a majority of co-owners, as defined in subdivision (6) of this section, shall constitute a quorum for the adoption of decisions;

(4) "General common elements" means:

(A) The land on which the building stands;

(B) The foundations, main walls, roofs, halls, lobbies, stairways, and entrance and exit or communication ways;

(C) The basements, flat roofs, yards, and gardens, except as otherwise provided or stipulated;

(D) The premises for the lodging of janitors or persons in charge of the building, except as otherwise provided or stipulated;

(E) The compartments or installations of central services such as power, light, gas, cold and hot water, refrigeration, reservoirs, water tanks and pumps, and the like;

(F) The elevators, garbage incinerators, and, in general, all devices or installations existing for common use; and

(G) All other elements of the building rationally of common use or necessary to its existence, upkeep, and safety;

(5) "Limited common elements" means those common elements which are agreed upon by all the co-owners to be reserved for the use of a certain number of apartments to the exclusion of the other apartments, such as special corridors, stairways, and elevators, sanitary services common to the apartments of a particular floor, and the like;

(6) "Majority of co-owners" means fifty-one percent (51%) or more of the basic value of the property as a whole, in accordance with the percentages computed in accordance with the provisions of § 18-13-112;

(7) "Master deed" means the deed establishing the horizontal property regime;

(8) "Person" means an individual, firm, corporation, partnership, association, trust, or other legal entity, or any combination thereof;

(9) "Property" means the land, the building, all improvements and structures thereon, and all easements, rights, and appurtenances belonging thereto;

(10) "To record" means to record in accordance with the provisions of §§ 14-15-402, 14-15-404, 14-15-407 — 14-15-417, and 16-46-101 or other applicable recording statutes; and

(11) All pronouns include the male, female, and neuter genders and include the singular or plural numbers, as the case may be.

History. Acts 1961 (1st Ex. Sess.), No. 60, § 2; 1969, No. 216, § 1; A.S.A. 1947, § 50-1002.

CASE NOTES

Cited: Preston v. Bass, 13 Ark. App. 94, 680 S.W.2d 115 (1984).

18-13-103. Establishment of horizontal property regimes.

Whenever a sole owner or the co-owners of a building already constructed or the owners of property upon which a building is to be constructed expressly declare, through the recordation of a master deed setting forth the particulars enumerated in § 18-13-104, their desire to submit their property to the regime established by this chapter, there shall be established a horizontal property regime.

History. Acts 1961 (1st Ex. Sess.), No. 60, § 3; 1975, No. 731, § 1; A.S.A. 1947, § 50-1003.

18-13-104. Master deed.

(a) The master deed creating and establishing the horizontal property regime shall be executed by the owner or owners of the real property making up the regime and shall be recorded in the office of the clerk and ex officio recorder of the county where the property is located.

(b) The master deed shall express the following particulars:

(1) The description of the land and the building, expressing their respective areas;

(2) The general description and number of each apartment, expressing its area, location, and any other data necessary for its identification;

(3) The description of the general common elements of the building and, in proper cases, of the limited common elements restricted to a given number of apartments, expressing which are those apartments; and

(4) The value of the property and of each apartment and, according to these basic values, the percentage appertaining to the co-owners in the expenses of, and rights in, the elements held in common.

History. Acts 1961 (1st Ex. Sess.), No. 60, § 9; A.S.A. 1947, § 50-1009.

18-13-105. Plans to be attached to master deed.

(a)(1) There shall be attached to the master deed, at the time it is filed for record, a full and exact copy of the plans of any existing building on the property or the plans for the building or buildings to be constructed thereon. The copy of the plans shall be entered of record along with the master deed.

(2) The plans shall show graphically all particulars of the building constructed or to be constructed, including, but not limited to, the

dimensions, area, and location of each apartment therein and the dimensions, area, and location of common elements affording access to each apartment. Other common elements, both limited and general, shall be shown graphically, insofar as possible, and shall be described in detail in words and figures.

(3) The plan shall be certified by an engineer or architect authorized and licensed to practice his or her profession in this state.

(b) Each apartment in a building shall be designated, on the plans referred to in subsection (a) of this section, by letter or number or other appropriate designation.

History. Acts 1961 (1st Ex. Sess.), No. 60, §§ 10, 11; 1975, No. 731, § 2; A.S.A. 1947, §§ 50-1010, 50-1011.

18-13-106. Additional units in excess of those described in master deed.

(a) The sole owner or co-owners of property constituted and established under this chapter as a horizontal property regime may, by description of their intentions in the master deed provided for in § 18-13-104, provide for the addition of apartments or units in the horizontal property regime in excess of those for which specific plans are initially recorded with the master deed.

(b) With reference to any such additional buildings, the plans recorded with the master deed shall reflect:

(1) The area of the property within which the additional apartments or units will be constructed;

(2) The maximum and minimum number of square feet and the maximum and minimum number of additional apartments or units to be constructed;

(3) A general description of any rights in the common elements to be enjoyed by the owners of any additional units or apartments;

(4) The date prior to which final detailed plans for the additional units or apartments will be recorded, with the amendment to the master deed reflecting the revised information to be included in the master deed pursuant to § 18-13-104; and

(5) A covenant and warranty extending to each and all of the owners of individual units or apartments in the regime that any such construction would be of similar quality, in a workmanlike manner, and in the same architectural style as the original buildings in the regime and that the construction will conform, generally, with the specifications set forth in the master deed as required in § 18-13-104.

(c)(1) Any property purportedly established as a horizontal property regime pursuant to this chapter and otherwise complying with it, but which at the time of the recording of the master deed called for in § 18-13-104 did not have one (1) or more completed buildings thereon or which provided for additional or future construction of one (1) or more buildings in addition to those for which plans were initially

recorded with the master deed, shall for all purposes be considered and treated as a horizontal property regime in accordance with this chapter.

(2) All mortgages thereof or conveyances thereof as such heretofore occurring shall, likewise, for all purposes be deemed as effective mortgages and conveyances of the same as against any claim that the regime was improperly established at the time thereof.

History. Acts 1961 (1st Ex. Sess.), No. 60, § 24; 1975, No. 731, §§ 4, 5; A.S.A. 1947, §§ 50-1024, 50-1025.

18-13-107. Waiver and reestablishment of regimes.

(a) All of the co-owners or the sole owner of a building or property constituted into a horizontal property regime may waive this regime and regroup or merge the records of the individual apartments, or anticipated apartments, with the principal property if the individual apartments are unencumbered or, if encumbered, if the creditors in whose behalf the encumbrances are recorded agree to accept as such security the undivided portions of the property owned by the debtors.

(b) The merger provided for in subsection (a) of this section shall in no way bar the subsequent constitution of the property into another horizontal property regime whenever so desired and upon observance of the provisions of this chapter.

History. Acts 1961 (1st Ex. Sess.), No. 60, §§ 12, 13; 1975, No. 731, § 3; A.S.A. 1947, §§ 50-1012, 50-1013.

18-13-108. Bylaws.

(a) The administration of every building constituted into horizontal property shall be governed by bylaws which shall be inserted in, or appended to, and recorded with the master deed.

(b) The bylaws must necessarily provide for at least the following:

(1) Form of administration, indicating whether this shall be in charge of an administrator or of a board of administration, or otherwise, and specifying the powers, manner of removal, and, where proper, the compensation thereof;

(2) Method of calling or summoning the co-owners to assemble, that a majority of at least fifty-one percent (51%) is required to adopt decisions, who is to preside over the meeting, and who will keep the minute book wherein the resolutions shall be recorded;

(3) Care, upkeep, and surveillance of the building and its general or limited common elements and services;

(4) Manner of collecting from the co-owners for the payment of the common expenses; and

(5) Designation and dismissal of the personnel necessary for the works and the general or limited common services of the building.

History. Acts 1961 (1st Ex. Sess.), No. 60, §§ 14, 15; A.S.A. 1947, §§ 50-1014, 50-1015.

CASE NOTES

ANALYSIS

Attorney's Fees.
Duty.

Attorney's Fees.

Although not doing so expressly, the legislature authorized horizontal property regimes to collect attorney's fees under the bylaws in this section by authorizing the collection of "any other expense lawfully agreed upon" in § 18-13-116. *Dameron v. University Estates, Phase II, Inc.*, 295 Ark. 533, 750 S.W.2d 402 (1988).

Duty.

Trial court erred in granting a property owners association summary judgment in a licensee's action alleging that the association was negligent in its installation and maintenance of a balcony railing because the association contractually promised or voluntarily agreed to repair and maintain the common areas. The association's undertaking of the duty to repair triggered fact questions as to whether it exercised reasonable care to perform its assumed duty. *Lloyd v. Pier W. Prop. Owners Ass'n*, 2015 Ark. App. 487 (2015).

18-13-109. Modification of administration.

(a) The sole owner of the building or, if there is more than one (1), the co-owners representing two-thirds ($\frac{2}{3}$) of the total value of the building may, at any time, modify the system of administration, but each one of the particulars set forth in § 18-13-108 shall always be embodied in the bylaws.

(b) No such modification may be operative until it is embodied in a recorded instrument, which shall be recorded in the same office and in the same manner as was the master deed and original bylaws of the horizontal property regime involved.

History. Acts 1961 (1st Ex. Sess.), No. 60, § 15; A.S.A. 1947, § 50-1015.

18-13-110. Book of receipts and expenditures — Examination.

(a) The administrator, the board of administration, or other form of administration specified in the bylaws shall keep a book with a detailed account, in chronological order, of the receipts and expenditures affecting the building and its administration and specifying the maintenance and repair expenses of the common elements and any other expenses incurred.

(b) Both the book and the vouchers accrediting the entries made thereupon shall be available for examination by all the co-owners at convenient hours on working days that shall be set and announced for general knowledge.

History. Acts 1961 (1st Ex. Sess.), No. 60, § 16; A.S.A. 1947, § 50-1016.

18-13-111. Status of individual units.

Once the property is submitted to the horizontal property regime, an apartment in the building may be individually conveyed and encumbered and may be the subject of ownership, possession, or sale and of all types of juridic acts *intervivos* or *causa mortis* as if it were sole and entirely independent of the other apartments in the building of which it forms a part, and the corresponding individual titles and interests shall be recordable.

History. Acts 1961 (1st Ex. Sess.), No. 60, § 4; A.S.A. 1947, § 50-1004.

18-13-112. Ownership and valuation of separate units and common elements.

(a)(1) An apartment owner shall have the exclusive ownership of his or her apartment and shall have a common right to a share, with the other co-owners, in the common elements of the property.

(2)(A) This share is equivalent to the percentage representing the value of the individual apartment with relation to the value of the whole property.

(B) This percentage shall be computed by taking as a basis the value of the individual apartment in relation to the value of the property as a whole.

(b) The percentage shall be expressed at the time the horizontal property regime is constituted, shall have a permanent character, and shall not be altered without the acquiescence of the co-owners representing all the apartments of the building.

(c) The basic value, which shall be fixed for the sole purpose of this chapter and irrespective of the actual value, shall not prevent each co-owner from fixing a different circumstantial value to his or her apartment in all types of acts and contracts.

History. Acts 1961 (1st Ex. Sess.), No. 60, § 6; A.S.A. 1947, § 50-1006.

18-13-113. Types of joint ownership.

Any apartment may be held and owned by more than one (1) person as joint tenants, as tenants in common, as tenants by the entirety, or in any other real estate tenancy relationship recognized under the laws of this state.

History. Acts 1961 (1st Ex. Sess.), No. 60, § 5; A.S.A. 1947, § 50-1005.

CASE NOTES**Creditor's Rights.**

A third party may execute against a spouse's interest in a tenancy by the en-

tirety, subject to the other spouse's continued rights of possession and survivorship, and interest in one-half of the rents and

profits. *Morris v. Solesbee*, 48 Ark. App. 123, 892 S.W.2d 281 (1995).

18-13-114. Common elements.

(a) The common elements, both general and limited, shall remain undivided and shall not be the object of an action for partition or division of the co-ownership. Any covenant to the contrary shall be void.

(b) Each co-owner may use the elements held in common in accordance with the purpose for which they are intended, without hindering or encroaching upon the lawful rights of the other co-owners.

History. Acts 1961 (1st Ex. Sess.), No. 60, §§ 7, 8; A.S.A. 1947, §§ 50-1007, 50-1008.

CASE NOTES

Appropriation of Common Area.

Carport constructed in common area created an exclusive appropriation of the general common area by the apartment

owner without proper approval by the other property owners and should be removed. *Preston v. Bass*, 13 Ark. App. 94, 680 S.W.2d 115 (1984).

18-13-115. Conveyances.

(a) Any conveyance or other instrument affecting title to an apartment which describes the apartment by using the plan letter or number followed by the words "in Horizontal Property Regime" shall be deemed to contain a good and sufficient description for all purposes.

(b) Any conveyance of an individual apartment shall be deemed to also convey the undivided interest of the owner in the common elements, both general and limited, appertaining to the apartment without specifically or particularly referring to it.

History. Acts 1961 (1st Ex. Sess.), No. 60, § 11; A.S.A. 1947, § 50-1011.

18-13-116. Liability for expenses and assessments.

(a)(1) The co-owners of the apartments are bound to contribute pro rata, in the percentages computed according to § 18-13-112, toward the expenses of administration and of maintenance and repair of the general common elements and, in the proper case, of the limited common elements of the building, and toward any other expense lawfully agreed upon.

(2)(A) However, the administrator, board of administration, or other form of administration of a horizontal property regime may establish additional assessments to be collected from any co-owner who makes his or her apartment available for rent or lease either directly or through an agent.

(B) Such additional assessments shall not exceed the amount reasonably calculated to cover expenses for additional security, wear

and tear on buildings, additional trash pickup, and other additional costs occasioned by such units being available for rent or lease.

(b) No co-owner may exempt himself or herself from contributing toward such expenses by waiver of the use or enjoyment of the common elements or by abandonment of the apartment belonging to him or her.

(c) Upon the sale or conveyance of an apartment, all unpaid assessments against a co-owner for his or her pro rata share in the expenses to which subsection (a) of this section refers shall first be paid out of the sales price or by the acquirer in preference over any other assessments or charges of whatever nature except the following:

(1) Assessments, liens, and charges for taxes past due and unpaid on the apartment; and

(2) Payments due under mortgage instruments of encumbrance duly recorded.

(d) The purchaser of an apartment shall be jointly and severally liable with the seller for the amounts owing by the latter under subsection (a) of this section up to the time of the conveyance, without prejudice to the purchaser's right to recover from the other party the amounts paid by him or her as the joint debtor.

History. Acts 1961 (1st Ex. Sess.), No. 60, §§ 17-19; A.S.A. 1947, §§ 50-1017 — 50-1019; Acts 1993, No. 434, § 1.

RESEARCH REFERENCES

Ark. L. Rev. Andrea J. Boyack & William E. Foster, Muddying the Waterfall: How Ambiguous Liability Statutes Distort

Creditor Priority in Condominium Foreclosures, 67 Ark. L. Rev. 225 (2014).

CASE NOTES

ANALYSIS

Attorney's Fees.
Interests.

Attorney's Fees.

Although not doing so expressly, the legislature authorized horizontal property regimes to collect attorney's fees under the bylaws in § 18-13-108 by authorizing the collection of "any other expense lawfully agreed upon" in this section. *Damron v. University Estates, Phase II, Inc.*, 295 Ark. 533, 750 S.W.2d 402 (1988).

Circuit court did not abuse its discretion in awarding attorney's fees to a property owners' association (POA) because nothing in the Arkansas Horizontal Property Act required the POA to obtain a lien, and, in any event, the POA filed a *lis pendens*

with regard to its claimed interest in the property. *First State Bank v. Metro Dist. Condos. Prop. Owners' Ass'n*, 2014 Ark. 48, 432 S.W.3d 1 (2014).

Interests.

Circuit court did not err in denying a foreclosing lender's motion for summary judgment and in refusing to extinguish the interest of a property owners' association because, while the money due and owing under a mortgage took priority over any unpaid assessments, the Arkansas Horizontal Property Act did not exclude foreclosure sales when it provided that a purchaser was jointly and severally liable with the seller for the amounts owing by the latter. *First State Bank v. Metro Dist. Condos. Prop. Owners' Ass'n*, 2014 Ark. 48, 432 S.W.3d 1 (2014).

18-13-117. Insurance generally.

The co-owners may, upon resolution of a majority, insure the building against risk, without prejudice to the right of each co-owner to insure his or her apartment on his or her own account and for his or her own benefit.

History. Acts 1961 (1st Ex. Sess.), No. 60, § 20; A.S.A. 1947, § 50-1020.

18-13-118. Application of insurance proceeds to reconstruction.

(a) In case of fire or any other disaster, the insurance indemnity shall, except as provided in subsection (b) of this section, be applied to reconstruct the building.

(b) Reconstruction shall not be compulsory when it comprises the whole or more than two-thirds ($\frac{2}{3}$) of the building. In such case, and unless otherwise unanimously agreed upon by the co-owners, the indemnity shall be delivered pro rata to the co-owners entitled to it in accordance with provision made in the bylaws or in accordance with a decision of three-fourths ($\frac{3}{4}$) of the co-owners if there is no bylaw provision.

(c) Should it be proper to proceed with the reconstruction, the provisions for such eventuality made in the bylaws shall be observed, or in lieu thereof the decision of the council of co-owners shall prevail.

History. Acts 1961 (1st Ex. Sess.), No. 60, § 21; A.S.A. 1947, § 50-1021.

18-13-119. Sharing of reconstruction costs when building not insured or indemnity insufficient.

(a) When the building is not insured or when the insurance indemnity is insufficient to cover the cost of reconstruction, the new building costs shall be paid by all the co-owners directly affected by the damage in proportion to the value of their respective apartments, or as may be provided by the bylaws.

(b) If any one (1) or more of those composing the minority shall refuse to make such payment, the majority may proceed with the reconstruction at the expense of all the co-owners benefited thereby, upon proper resolution setting forth the circumstances of the case and the cost of the works, with the intervention of the council of co-owners.

(c) The provisions of this section may be changed by unanimous resolution of the parties concerned adopted subsequent to the date on which the fire or other disaster occurred.

History. Acts 1961 (1st Ex. Sess.), No. 60, § 22; A.S.A. 1947, § 50-1022.

18-13-120. Taxation.

(a)(1) Taxes, assessments, and other charges of this state, of any political subdivision, of any special improvement district, or of any other taxing or assessing authority shall be assessed against and collected on each individual apartment.

(2) Each tax, assessment, or other charge on the apartment shall be carried on the tax books as a separate and distinct entity for that purpose and not on the building or property as a whole.

(b) No forfeiture or sale of the building or property as a whole for delinquent taxes, assessments, or charges shall ever divest or in any way affect the title to an individual apartment so long as taxes, assessments, and charges on the individual apartment are currently paid.

History. Acts 1961 (1st Ex. Sess.), No. 60, § 23; A.S.A. 1947, § 50-1023.

CHAPTER 14
ARKANSAS TIME-SHARE ACT

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. ADMINISTRATION AND REGISTRATION.
3. CREATION, TERMINATION, AND MANAGEMENT.
4. PROTECTION OF PURCHASERS.
5. ADVERTISING.
6. FINANCING.
7. CAMPING SITES.

A.C.R.C. Notes. References to "this chapter" in subchapters 1-6 may not apply to subchapter 7 which was enacted subsequently.

Publisher's Notes. This chapter was based on the Model Real Estate Time-Share Act.

RESEARCH REFERENCES

ALR. Regulation of time-share or interval ownership interests in real estate. 6 A.L.R.4th 1288.

Liability of owner of unit in condominium, recreational development, time

share property, or the like, for assessment in support of common facilities levied against and unpaid by prior owner. 39 A.L.R.4th 114.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 18-14-101. Title.
18-14-102. Definitions.

SECTION.

- 18-14-103. Applicability.
18-14-104. Legal status of time-share es-

SECTION.

tates.
18-14-105. Regulatory discrimination
prohibited.

Effective Dates. Acts 1983, No. 294, § 6-106: Mar. 25, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that it is essential to the protection of the residents of this State that provision be made for the sale and regulation of Time-Share Intervals by the Real Estate Commission; that this Act is designed to provide for such regulation and should be given effect at the earliest possible date. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."
Acts 1983, No. 765, § 8: Mar. 24, 1983. Emergency clause provided: "It is hereby

found and determined by the General Assembly that various provisions of Act 294 of 1983 relating to the regulation of real estate time-share intervals by the Arkansas Real Estate Commission are in urgent need of revision to enable the Commission to effectively and efficiently administer the provisions of the Act; that this Act is designed to make the necessary revisions and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

18-14-101. Title.

This chapter shall be known and may be cited as the "Arkansas Time-Share Act".

History. Acts 1983, No. 294, Art. 1, § 1-101; A.S.A. 1947, § 50-1301; Acts 2013, No. 710, § 1.

Amendments. The 2013 amendment made stylistic changes.

CASE NOTES

Cited: Dogpatch Properties, Inc. v. Dogpatch U.S.A., Inc., 810 F.2d 782 (8th Cir. 1987).

18-14-102. Definitions.

As used in this chapter:

(1) "Accommodation" means an apartment, condominium or cooperative unit, cabin, lodge, hotel or motel room, or other private or commercial structure that:

(A) Is affixed to real property;

(B) Is designed for occupancy or use by one (1) or more individuals; and

(C) Is part of a time-share plan;

(2) "Acquisition agent" means a person that by telephone, inducement, solicitation, or otherwise in the ordinary course of business

directly tries to encourage a person in this state to attend a sales presentation for a time-share plan;

(3) "Amenities" means a recreational facility made available to purchasers in a time-share plan;

(4) "Association" means a council or an association composed of the owners of time-share interests in a time-share plan;

(5)(A) "Broker" means a person that sells or offers to sell in the ordinary course of business, time-share interests in a time-share plan to a purchaser.

(B) A broker and a sales agent conducting business from a location in this state, whether on a temporary or ongoing basis, are subject to the Real Estate Law, § 17-42-101 et seq.

(C) A violation that results from a time-share activity is not subject to the Real Estate Law, § 17-42-401 et seq.;

(6)(A) "Component site" means a specific geographic location where accommodations that are part of a multisite time-share plan are located.

(B) Separate phases of a single time-share property in a specific geographic location under common management are considered a single component site;

(7)(A) "Developer" means:

(i) A person who establishes a time-share plan, or is in the business of selling time-share interests or that uses a broker to sell time-share interests; or

(ii) A person that succeeds in the developer's interest by sale, lease, assignment, mortgage, or other transfer, if the person:

(a) Offers at least twelve (12) time-share interests in a particular time-share plan; and

(b) Is in the business of selling time-share interests or uses a broker to sell time-share interests.

(B) "Developer" does not include a broker who is in the business of selling time-share interests;

(8) "Exchange agent" means a person that owns or operates an exchange program;

(9) "Exchange program" means a method, arrangement, or procedure for the voluntary exchange of time-share interests among time-share owners;

(10) "Managing agent" means a person responsible for operating and maintaining a time-share property or time-share plan on behalf of the association;

(11)(A) "Offering" means an offer to sell, a solicitation, an inducement, or an advertisement made in this state, whether directly or indirectly or by radio, television, newspaper, magazine, mail, or electronic media, in which a person is given an opportunity or encouraged to acquire a time-share interest.

(B) "Offering" does not include a time-share owner that may refer a person to a developer if the time-share owner's activities are limited to the referral of a prospective purchaser to the developer, the

time-share owner receives nominal consideration, and does not refer more than twenty (20) prospective purchasers to the developer annually;

(12) "Person" means one (1) or more natural persons, corporations, partnerships, associations, trusts, other entities, or any combination thereof;

(13) "Project instrument" means a time-share instrument or other applicable document that establishes a time-share plan that contains restrictions or covenants to regulate the use, occupancy, or disposition of a time-share plan, including a declaration, rule, or an amendment thereto, of a condominium, and the articles of incorporation, bylaws, rules of an association, or an amendment thereto;

(14) "Public offering statement" means the statement under § 18-14-404;

(15) "Purchaser" means a person other than a developer or lender who acquires an interest in a time-share plan;

(16)(A) "Reservation system" means the method, arrangement, or procedure where a purchaser is required to compete with other purchasers to reserve an accommodation of a multisite time-share plan for one (1) or more time-share periods regardless of whether the reservation system is operated and maintained by the multisite time-share plan, a managing entity, an exchange company, or other person.

(B) If a purchaser is required to use an exchange program as the principal means of reserving an accommodation and facility of the plan, the arrangement is a reservation system.

(C) If the exchange company uses a mechanism to exchange time-share periods among members of the exchange program, the use of the mechanism is not a reservation system in a multistate time-share plan;

(17)(A) "Time-share estate" means an arrangement by which the purchaser receives a right to occupy a time-share property, together with a real estate interest in the time-share property.

(B) "Time-share estate" includes real property interests held in a trust in which the owners or the owners' association of the time-share plan are the express beneficiaries of that trust and the trustee is independent of the developer.

(C) If the real property interests are held in a trust, the conveyance of the real property to the trust shall be free of financial liens and encumbrances or include a recorded nondisturbance agreement;

(18) "Time-share instrument" means a master deed, master lease, declaration, or other instrument used to establish a time-share plan;

(19) "Time-share interest" means a time-share estate or a time-share use;

(20)(A) "Time-share plan" means an arrangement, plan, scheme, or similar method, excluding an exchange program but including a membership agreement, sale, lease, deed, license, or right-to-use agreement, in which a purchaser, in exchange for consideration,

receives an ownership right in or the right to use the accommodations for a period of time less than a year during a given year, but not necessarily consecutive years, regardless of whether the period of time is determined in advance.

(B) A time-share plan may be either a:

(i) "Single site time-share plan" which is the right to use an accommodation at a single time-share property; or

(ii) "Multisite time-share plan" which includes:

(a) A "specific time-share interest" which is the right to use an accommodation at a specific time-share property, together with the use rights in accommodations at one (1) or more other component sites established by or acquired through the reservation system of the time-share plan; or

(b) A "nonspecific time-share interest" which is the right to use accommodations at more than one (1) component site established by or acquired through the reservation system of the time-share plan but does not include the specific right to use any particular accommodations;

(21) "Time-share property" means:

(A) One (1) or more accommodations and related amenities that are subject to a time-share instrument; and

(B) Any other property or property rights appurtenant to the accommodations and amenities; and

(22) "Time-share use" means any arrangement under which the purchaser receives a right to occupy a time-share property but does not receive a time-share estate.

History. Acts 1983, No. 294, Art. 1, § 1-103; A.S.A. 1947, § 50-1303; Acts 1989, No. 45, § 1; 2013, No. 710, § 1.

Publisher's Notes. Acts 1989, No. 45, § 3, provided that the Arkansas Real Es-

tate Commission may promulgate such regulations as it deems necessary for the implementation of this act.

Amendments. The 2013 amendment rewrote the section.

18-14-103. Applicability.

(a) This chapter applies to a time-share plan established after February 25, 1983, under § 18-14-201 et seq., § 18-14-401 et seq., and § 18-14-501 et seq.

(b) This chapter does not apply to the offer or sale of a time-share interest if the use extends over a period of three (3) years or less, whether or not the accommodation is located in this state.

History. Acts 1983, No. 294, Art. 1, § 1-102; 1983, No. 765, § 1; A.S.A. 1947, § 50-1302; Acts 2013, No. 710, § 1.

Amendments. The 2013 amendment, in (a), substituted "applies to a time-share plan established" for "shall apply to any

time-share program created or commenced", and "under" for "and ninety (90) days thereafter as to any time share program heretofore created or commenced with respect to the requirements of"; and added (b).

18-14-104. Legal status of time-share estates.

(a)(1) A time-share estate is an estate in real property and has the character and incidents of an estate in fee simple at common law, including an estate for years with a remainder over in fee simple or an estate for years with no remainder if a leasehold.

(2) This section supersedes any contrary rule at common law.

(b) A document transferring or encumbering a time-share estate in real property shall not be rejected for recordation because of the nature or duration of that estate or interest.

(c) For purposes of title, a time-share estate constitutes a separate estate or interest in property, except for real property tax purposes.

History. Acts 1983, No. 294, Art. 1, §§ 1-104, 1-105; A.S.A. 1947, §§ 50-1304, 50-1305; Acts 2013, No. 710, § 1.

Amendments. The 2013 amendment redesignated (a) as (a)(1) and (2); substituted "including" for "It may include" in (a)(1); substituted "This section super-

sedes" for "The foregoing shall supersede" in (a)(2); substituted "shall not" for "may not" in (b); and, in (c), deleted "Each time-share estate constitutes" from the beginning and inserted "time-share estate constitutes a".

18-14-105. Regulatory discrimination prohibited.

A zoning, subdivision, or other ordinance or regulation shall not discriminate against the establishment of time-share interests or impose a requirement upon a time-share plan that it would not impose upon a similar development under a different form of ownership.

History. Acts 1983, No. 294, Art. 1, § 1-106; A.S.A. 1947, § 50-1306; 2013, No. 710, § 1.

Amendments. The 2013 amendment

substituted "shall not" for "may not", "establishment" for "creation", "interests" for "intervals", and "plan that" for "program which".

SUBCHAPTER 2 — ADMINISTRATION AND REGISTRATION

SECTION.

18-14-201. Powers and duties of the Arkansas Real Estate Commission.

18-14-202. Registration required.

18-14-203. Abbreviated registration — Exemptions.

SECTION.

18-14-204. Application for registration.

18-14-205. Material changes.

18-14-206. Effectiveness of registration or amendment.

18-14-207. Regulation and use of public offering statement.

Effective Dates. Acts 1983, No. 294, § 6-106; Mar. 25, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that it is essential to the protection of the residents of this State that provision be made for the sale and regulation of Time-Share Intervals by the Real Estate Commission; that this Act is designed to provide for

such regulation and should be given effect at the earliest possible date. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1983, No. 765, § 8; Mar. 24, 1983. Emergency clause provided: "It is hereby

found and determined by the General Assembly that various provisions of Act 294 of 1983 relating to the regulation of real estate time-share intervals by the Arkansas Real Estate Commission are in urgent need of revision to enable the Commission to effectively and efficiently administer the provisions of the Act; that this Act is

designed to make the necessary revisions and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

18-14-201. Powers and duties of the Arkansas Real Estate Commission.

(a) The Arkansas Real Estate Commission may:

- (1) Set fees;
- (2) Adopt, amend, and repeal rules;
- (3) Issue orders consistent with this chapter;
- (4) Prescribe forms and procedures for submitting information to the commission;
- (5) Accept grants-in-aid from any governmental source;
- (6) Contract with agencies charged with similar functions in this or other jurisdictions;
- (7) Cooperate with agencies performing similar functions in this and other jurisdictions to develop uniform filing procedures and forms, uniform disclosure standards, and uniform administrative practices;
- (8) Develop information that may be useful in the discharge of the duties of the commission;
- (9) Initiate private investigations within or without this state;
- (10) After notice and a hearing under this chapter and the Arkansas Administrative Procedure Act, § 25-15-201 et seq.:
 - (A) Issue a notice of suspension;
 - (B) Impose a civil penalty of no more than five thousand dollars (\$5,000) per occurrence; and
 - (C) Assess costs against the person if:
 - (i) A representation in any document or information filed with the commission is false or misleading;
 - (ii) A developer or agent of a developer has engaged or is engaging in any unlawful act or practice;
 - (iii) A developer or agent of a developer has distributed, caused to be distributed, or is distributing, orally or in writing, false or misleading promotional materials concerning a time-share plan;
 - (iv) A developer or agent of a developer has concealed, diverted, or disposed of any funds or assets of a person in a way that impairs rights of purchasers of time-share interests in the time-share plan;
 - (v) A developer or agent of a developer has failed to perform a stipulation or agreement made to induce the commission to issue an order relating to that time-share plan; or
 - (vi) A developer or agent of a developer has otherwise violated this chapter or the rules or orders of the commission;

(11) Issue a cease and desist order if the developer has not registered the time-share plan under this chapter; and

(12) After notice and hearing, issue an order revoking the registration of a time-share plan upon a determination that a developer or agent of a developer has failed to comply with a notice of suspension issued by the commission, which order affects the time-share plan.

(b) In addition to the civil penalties under subdivision (a)(10) of this section, the commission may require the person found to have violated this chapter or the rules or orders of the commission to reimburse any compensation, fees, or other remuneration collected during the activity that resulted in the violation.

History. Acts 1983, No. 294, Art. 4, § 4-101; A.S.A. 1947, § 50-1325; Acts 2013, No. 710, § 2. **Amendments.** The 2013 amendment rewrote the section.

18-14-202. Registration required.

(a)(1)(A) A developer shall not offer or dispose of a time-share interest unless the time-share plan is registered with the Arkansas Real Estate Commission.

(B) However, a developer may accept a reservation together with a deposit if the deposit is:

(i) Placed in an escrow account with an institution having trust powers; and

(ii) Refundable to the purchaser at any time.

(2) A reservation requires a subsequent affirmative act by the purchaser via a separate instrument to establish a binding obligation.

(3) A developer shall not dispose of or transfer a time-share interest while an order revoking or suspending the registration of the time-share plan is in effect.

(b)(1) An acquisition agent shall register the time-share plan for which it is providing prospective purchasers with the commission unless there is an effective registration of the plan filed with the commission by the developer.

(2) An acquisition agent if other than the developer shall furnish to the commission:

(A) Its principal office address and telephone number;

(B) The name of its designated responsible managing employee; and

(C) Any additional information the commission requires including evidence that a bond in an amount determined by the commission but not to exceed twenty-five thousand dollars (\$25,000) has been placed with a surety company, corporate bond acceptable to the commission, or a cash bond with the commission to cover a violation of any solicitation ordinances, zoning ordinances, building codes, or other regulations governing the use of the premises in which the time-share plan is promoted.

(3) Each acquisition agent shall renew the registration annually and pay a filing fee not to exceed one hundred fifty dollars (\$150) for the registration and each renewal of the registration.

(c)(1) A real estate principal broker shall register with the commission the time-share plan that it is selling unless there is an effective registration of the plan filed with the commission by the developer.

(2) The real estate principal broker if other than the developer shall furnish to the commission:

- (A) Its principal office address and telephone number;
- (B) The name of its designated responsible managing employee;
- (C) Any special escrow accounts set up for the deposit and collection of purchasers' funds; and

(D) Any additional information the commission requires, including evidence that a bond in an amount determined by the commission but not to exceed twenty-five thousand dollars (\$25,000) has been placed with a surety company, corporate bond acceptable to the commission, or a cash bond with the commission to cover any defalcations of the real estate principal broker and any of its sales agents.

(3) Each real estate principal broker shall renew its registration annually and pay a filing fee not to exceed one hundred fifty dollars (\$150) for the registration and each renewal of the registration.

(d)(1) A managing agent shall register with the commission the time-share plan that it is managing unless there is an effective registration of the plan filed with the commission by the developer.

(2) The managing agent shall furnish to the commission:

- (A) Its principal office address and telephone number;
- (B) The name of its designated responsible managing employee; and

(C) Any additional information the commission requires, including evidence that a bond in an amount determined by the commission but not to exceed twenty-five thousand dollars (\$25,000) has been placed with a surety company, corporate bond acceptable to the commission, or a cash bond with the commission to cover any default of the managing agent of his or her duties and responsibilities.

(3) Each managing agent shall renew the registration annually and pay a filing fee not to exceed one hundred fifty dollars (\$150) for the registration and each renewal of the registration.

(e)(1) If the acquisition agent, real estate principal broker, or management agent is under the control of, a subsidiary of, or affiliate of the developer, the bond of the broker or agent whether one (1) or more, can be consolidated and reduced to an amount determined by the commission but not to exceed seventy-five thousand dollars (\$75,000) if there is a disclosure of the affiliation to the commission.

(2) If the developer registers an additional time-share plan, including additional phases, in the existing time-share plan with the commission, the developer is not required to furnish an additional bond or increase the existing bond for the additional registration if the initial bond remains in effect.

(f)(1) An exchange agent shall file a statement with the commission containing:

(A) A list of the time-share plans or properties that it is offering exchange services for;

(B) Its principal office address and telephone number; and

(C) The name of its designated responsible managing employee or its contact person.

(2) Each exchange agent shall renew his or her registration annually and pay a filing fee not to exceed one hundred fifty dollars (\$150) for the registration and each renewal thereof of the registration.

(g) The acquisition agent and real estate principal broker shall each maintain their respective records of any employees or independent contractors employed by them, their addresses, and the commissions paid for the immediately preceding two (2) calendar years.

(h) Any interest earned on a bond or a bond substitute, whether cash, certificate of deposit, bank account, security, or other instrument, while on deposit with or for the benefit of the commission becomes the separate property of the commission and is deposited into the Real Estate Recovery Fund in § 17-42-403.

(i) A filing fee may be discounted for an applicant that submits the required filings using the Association of Real Estate License Law Officials' web-based document management program.

History. Acts 1983, No. 294, Art. 4, § 4-102; 1983, No. 765, § 2; A.S.A. 1947, § 50-1326; Acts 1989, No. 44, § 1; 2013, No. 710, § 2.

Publisher's Notes. Acts 1989, No. 44, § 4, provided that the Arkansas Real Es-

tate Commission may promulgate such regulations as it deems necessary for the implementation of this act.

Amendments. The 2013 amendment rewrote the section.

18-14-203. Abbreviated registration — Exemptions.

(a) An abbreviated registration with the Arkansas Real Estate Commission may be accepted if the developer is registered and has issued a public offering statement or similar disclosure document that is provided to purchasers under any of the following:

(1) Securities Act of 1933, 15 U.S.C. § 77a et seq.;

(2) Arkansas Securities Act, § 23-42-101 et seq.;

(3) Federal Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701 et seq., if the time-share plan is made a part of the subdivision that is being registered; and

(4) Any federal or state act that requires a federal or state agency to review a public offering statement or similar disclosure document that must be distributed to purchasers if the commission determines that the federal or state public offering statement is substantially equivalent to that required by this chapter.

(b) Annually or when a public offering statement is amended, the public offering statement shall be submitted to the commission for recertification.

(c) An applicant filing an abbreviated registration shall pay:

- (1) A filing fee not to exceed five hundred dollars (\$500);
- (2) Any necessary investigation expenses as stated in § 18-14-204(d); and
- (3) A fee not to exceed three hundred dollars (\$300) for each request for recertification under subsection (b) of this section.
- (d) A registration with the commission is not required in the case of:
 - (1) A transfer of a time-share interest by any time-share interest owner other than the developer or its agent unless the transfer is made to evade this chapter;
 - (2) Any disposition under a court order;
 - (3) A disposition by a government or governmental agency;
 - (4) A disposition by foreclosure or deed in lieu of foreclosure;
 - (5) A developer's offer of additional time-share interests in a time-share plan located outside this state to owners that have previously purchased from the developer or a developer under common ownership or control with the developer, if the developer has had a registration or amendment approved by the commission within the preceding seven (7) years;
 - (6) A gratuitous transfer of a time-share interest;
 - (7) A time-share property that consists of a single accommodation and related amenities for which the developer or a person under the control of, a subsidiary of, or affiliate of the developer operates as the acquisition agent, broker, or exchange agent; or
 - (8) A disposition of a time-share interest owned by an owners' association of which the time-share interest is a part.

History. Acts 1983, No. 294, Art. 4, § 4-107; 1983, No. 765, § 5; A.S.A. 1947, § 50-1331; Acts 2013, No. 710, § 2.

Amendments. The 2013 amendment

substituted "Abbreviated registration — Exemptions" for "Exemptions from registration" in the section heading; and rewrote the section.

18-14-204. Application for registration.

- (a) An application for registration of a time-share plan shall contain:
 - (1) The public offering statement;
 - (2) A brief description of the time-share property;
 - (3) Copies of time-share instruments;
 - (4) Financial statements prepared according to generally accepted accounting principles and fully and fairly disclosing the current financial condition of the developer;
 - (5) Any other documents referred to in the registration application; and
 - (6) Other information as required by the Arkansas Real Estate Commission.
- (b)(1) If the accommodation in the time-share plan is in a condominium development or other common-interest subdivision, the application for registration shall contain evidence that the use of the accommodation for time-share purposes is not prohibited by the project instruments.

(2) If the project instruments do not expressly authorize time-sharing, the application for registration shall contain evidence that purchasers in the condominium development or other common-interest subdivision were given written notice at least sixty (60) days before the application for registration was submitted that the accommodation would be used for time-share purposes.

(3) If the project instruments contain a prohibition against time-sharing, the board of directors of the association shall certify that the amendment procedures in the project instruments were followed and that the project instruments have been amended to permit time-sharing.

(c) The application shall be accompanied by a filing fee not to exceed one thousand dollars (\$1,000).

(d)(1) The commission shall thoroughly investigate matters relating to the application and may require a personal inspection of the time-share property by a person designated by it.

(2) All direct expenses incurred by the commission in inspecting the time-share property are paid by the applicant, and the commission may require a deposit sufficient to cover the direct expenses before incurring them.

(e) An application for registration shall be renewed, annually, and the renewal filing fee shall not exceed five hundred dollars (\$500).

History. Acts 1983, No. 294, Art. 4, § 4-103; 1983, No. 765, § 3; A.S.A. 1947, § 50-1327; Acts 2013, No. 710, § 2. **Amendments.** The 2013 amendment rewrote the section.

18-14-205. Material changes.

(a) A developer shall amend or supplement its registration to report a material change in the information required by § 18-14-204.

(b)(1) If there is a material change in a registration document, the developer shall file an amendment with the Arkansas Real Estate Commission to report the material change no later than forty-five (45) days after the developer knows or reasonably should have known of the change.

(2) The developer may continue to offer and dispose of time-share interests under the existing registration pending review of the amendments by the commission if the developer discloses the material change to prospective purchasers.

(3) The commission may charge a fee not to exceed three hundred dollars (\$300) to process an amendment.

History. Acts 1983, No. 294, Art. 4, § 4-106; A.S.A. 1947, § 50-1330; Acts 2013, No. 710, § 2. **Amendments.** The 2013 amendment added (b)(1) through (3).

18-14-206. Effectiveness of registration or amendment.

(a)(1) Except as otherwise provided, the effective date of the registration or any amendment is forty-five (45) days after its filing or such earlier date as the Arkansas Real Estate Commission may determine, having regard for the public interest and the protection of purchasers.

(2) If an amendment to a registration is filed before the effective date, the registration is considered to have been filed when the amendment was filed.

(b)(1) If it appears to the commission that the application for registration or an amendment to the registration is on its face incomplete or inaccurate in any material respect, the commission shall so advise the developer by listing each deficiency in writing before the date the registration would otherwise be effective.

(2) The notification of the deficiency serves to suspend the effective date of the filing until ten (10) days after the developer files the additional information as required by the commission.

(3)(A) Any developer, upon receipt of the notice of deficiencies, may request a hearing.

(B) The hearing shall be held within thirty (30) days of receipt of the request.

History. Acts 1983, No. 294, Art. 4, § 4-105; 1983, No. 765, § 4; A.S.A. 1947, § 50-1329; Acts 2013, No. 710, § 2. **Amendments.** The 2013 amendment rewrote the section.

18-14-207. Regulation and use of public offering statement.

(a)(1) The Arkansas Real Estate Commission may require a developer to alter or supplement the form or substance of a public offering statement to assure adequate and accurate disclosure to prospective purchasers.

(2) The commission may require that certain disclosures contained in the public offering statement be in boldface type to protect the purchaser.

(b)(1) The public offering statement shall not be used for promotional purposes before registration and may be used afterwards only in its entirety.

(2) A person shall not advertise that the commission has approved or recommended the time-share plan, the disclosure statement, or any of the documents contained in the application for registration.

History. Acts 1983, No. 294, Art. 4, § 4-104; A.S.A. 1947, § 50-1328; Acts 2013, No. 710, § 2.

Amendments. The 2013 amendment subdivided (a) and (b); substituted "Arkansas Real Estate Commission" for "agency" in (a)(1); in (a)(2), substituted "The commission" for "In order to ensure adequate protection of the purchaser through disclosure, the agency", deleted "placed" preceding "in boldface" and added "to protect the purchaser" to the end; in (b)(1), substituted "shall not" for "may not", deleted "any" preceding "promotional", "the statement" preceding "may be used", and "if it is used" following "only"; and, in (b)(2), substituted "A person shall not advertise that the commis-

sion" for "No person may advertise or represent that the agency" and "plan" for "program".

SUBCHAPTER 3 — CREATION, TERMINATION, AND MANAGEMENT

SECTION.

- 18-14-301. Time-share plans permitted.
- 18-14-302. Contents of instruments establishing time-share estates.
- 18-14-303. Provisions for management and operation of time-share estate plans.
- 18-14-304. Developer control period.
- 18-14-305. Instruments establishing time-share uses.

SECTION.

- 18-14-306. Provisions for management and operation of time-share use plans.
- 18-14-307. Partition of accommodations.
- 18-14-308. Records.
- 18-14-309. Supervisory authority.
- 18-14-310. Out-of-state time-share plan.

Effective Dates. Acts 1983, No. 294, § 6-106; Mar. 25, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that it is essential to the protection of the residents of this State that provision be made for the sale and regulation of Time-Share Intervals by the Real Estate Commission;

that this Act is designed to provide for such regulation and should be given effect at the earliest possible date. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

18-14-301. Time-share plans permitted.

A time-share plan may be established in any accommodation unless expressly prohibited by the project instruments.

History. Acts 1983, No. 294, Art. 2, § 2-101; A.S.A. 1947, § 50-1308; Acts 2013, No. 710, § 3.

Amendments. The 2013 amendment

substituted "plans" for "programs" in the section heading; and substituted "plan" for "program", "established" for "created" and "accommodation" for "unit".

18-14-302. Contents of instruments establishing time-share estates.

A project and time-share instrument that establishes a time-share estate located or offered in this state shall contain:

- (1) The name of the county in which the property is situated;
- (2) The legal description, street address, or other description sufficient to identify the property;
- (3) Identification of time periods by letter, name, number, or combination thereof;
- (4) Identification of time-share estates and, when applicable, the method by which additional time-share estates may be established;

(5) The formula, fraction, or percentage of the common expenses and any voting rights assigned to each time-share estate and, when applicable, to each accommodation in a project that is not subject to the time-share plan;

(6) Restrictions on the use, occupancy, alteration, or alienation of time-share interests;

(7) The ownership interest, if any, in personal property and for care and replacement;

(8) Any other matters the developer considers appropriate; and

(9)(A) Provisions concerning the establishment of a lien against an owner's time-share interest in favor of the association of time-share estate owners to secure payment of common expenses.

(B) This lien when provided for in the time-share instrument is enforceable and foreclosable in the way other statutory liens are enforceable and foreclosable under the laws of this state.

History. Acts 1983, No. 294, Art. 2, § 2-102; A.S.A. 1947, § 50-1309; Acts 2013, No. 710, § 3.

Amendments. The 2013 amendment substituted "establishing" for "creating" in the section heading; rewrote the introductory language; in (4), substituted "when" for "where", "by which" for "whereby", and "established" for "created"; in (5), substituted "when" for "where", "accommoda-

tion" for "unit", and "plan" for "program"; in (6), substituted "Restrictions" for "Any restrictions" and "interests" for "intervals"; substituted "considers" for "deems" in (8); subdivided (9) as (9)(A) and (9)(B); substituted "Provisions concerning" for "Any provisions pertaining to" in (9)(A); and, in (9)(B), substituted "is" for "shall be" and "way" for "same manner in which".

18-14-303. Provisions for management and operation of time-share estate plans.

The time-share instruments for a time-share estate plan offered in this state shall prescribe reasonable arrangements for management and operation of the time-share plan or time-share property and for the maintenance, repair, and furnishing of accommodations including:

(1) Establishment of an association of time-share estate owners;

(2) Adoption of bylaws for organizing and operating the association;

(3) Payment of costs and expenses of operating the time-share plan or time-share property and owning and maintaining the accommodations;

(4) Employment and termination of employment of the managing agent for the association;

(5) Preparation and dissemination to owners of information concerning the time-share plan or property, including:

(A) An annual budget;

(B) Operating statements; and

(C) Other financial information;

(6) Procedures for establishing the rights of owners for the use of accommodations by prearrangement or under a first-reserved, first-served system;

(7) Adoption of standards and rules of conduct for the use and occupancy of accommodations by owners;

(8) Collection of assessments from owners to defray the expenses of management of the time-share plan or time-share property and maintenance of the accommodation and amenities of the time-share plan or time-share property;

(9) Comprehensive general liability insurance for death, bodily injury, and property damage arising out of, or in connection with, the use of the accommodations by owners, their guests, and other users;

(10) Methods for providing compensating use periods or monetary compensation to an owner if an accommodation cannot be made available for the period to which the owner is entitled by schedule or by confirmed reservation; and

(11)(A) Procedures for imposing a monetary penalty or suspension of an owner's rights and privileges in the time-share plan for failure of the owner to comply with the time-share instruments or the rules of the association concerning the use of the accommodations and amenities.

(B) Under these procedures an owner shall be given notice and the opportunity to refute or explain the charges against him or her in person or in writing to the governing body of the association before a decision to impose discipline is rendered.

(C) A monetary penalty may be secured by the lien in § 18-14-302.

History. Acts 1983, No. 294, Art. 2, § 2-103; A.S.A. 1947, § 50-1310; Acts 2013, No. 710, § 3.

Amendments. The 2013 amendment rewrote the section.

18-14-304. Developer control period.

(a) The time-share instruments for a time-share estate plan may provide for a length of time, known as the "developer control period", during which the developer, or a managing agent selected by the developer, may manage the time-share plan and the accommodations in the time-share plan.

(b) If the time-share instruments for a time-share estate plan provide for the establishment of a developer control period, the procedure shall ordinarily include:

(1) Termination of the developer control period by action of the association or by operation of the time-share instruments;

(2) Termination of contracts for goods and services for the time-share plan or for accommodations in the time-share plan during the developer control period; and

(3) A regular accounting by the developer to the association concerning matters that significantly affect the interests of owners in the time-share plan.

History. Acts 1983, No. 294, Art. 2, § 2-104; A.S.A. 1947, § 50-1311; Acts 2013, No. 710, § 3.

Amendments. The 2013 amendment substituted "plan" for "program" and "ac-

commodations" for "units" throughout the section; in (a), substituted "length" for "period" and "known" for "hereafter referred to"; substituted "the procedure shall ordinarily include" for "they shall

ordinarily include provisions for the following" in (b); added "or by operation of the time-share instruments" in (b)(1); de-

leted "entered into" preceding "during" in (b)(2); and substituted "concerning" for "as to all" in (b)(3).

18-14-305. Instruments establishing time-share uses.

A project instrument or time-share instrument that establishes time-share uses containing accommodations located or offered in this state shall contain:

- (1) Identification by name of the time-share plan and street address where the time-share plan is situated;
- (2) Identification of the time periods, type of accommodations, the accommodations that are in the time-share plan and the length of time that the accommodations are committed to the time-share plan;
- (3) In case of a time-share plan, identification of which accommodations are in the time-share plan and the method for adding, deleting, or substituting other accommodations; and
- (4) Any other matters that the developer considers appropriate.

History. Acts 1983, No. 294, Art. 2, § 2-105; A.S.A. 1947, § 50-1312; Acts 2013, No. 710, § 3.

Amendments. The 2013 amendment substituted "establishing" for "creating" in the section heading; substituted "plan" for "project" or "program" and "accommoda-

tions" for "units" throughout the section; rewrote the introductory language; substituted "for adding, deleting, or substituting other accommodations" for "whereby any other units may be added, deleted, or substituted" in (3); and substituted "considers" for "deems" in (4).

18-14-306. Provisions for management and operation of time-share use plans.

The time-share instruments for a time-share use plan containing accommodations offered in this state shall prescribe reasonable arrangements for the management and operation of the time-share plan and for the maintenance, repair, and furnishing of accommodations including:

- (1) Standards and procedures for upkeep, repair, and interior furnishing of accommodations and for maid, cleaning, linen, and similar services to the accommodations during use periods;
- (2) Adoption of standards and rules of conduct governing the use and occupancy of accommodations by owners;
- (3) Payment of the costs and expenses of operating the time-share plan and owning and maintaining the accommodations;
- (4) Selection of a managing agent;
- (5) Preparation and dissemination to owners of an annual budget, operating statements, and other financial information concerning the time-share plan or time-share property;
- (6) Procedures for establishing the rights of owners to the use of accommodations by prearrangement or under a first-reserved, first-served priority system;

(7) Organization of a management advisory board consisting of time-share use owners, including an enumeration of rights and responsibilities of the board;

(8) Procedures for imposing and collecting assessments or use fees from time-share use owners as necessary to defray costs of management of the time-share plan and providing materials and services to the accommodations;

(9) Comprehensive general liability insurance for death, bodily injury, and property damage arising out of, or in connection with, the use of accommodations by time-share use owners, their guests, and other users;

(10) Methods for providing compensating use periods or monetary compensation to an owner if an accommodation cannot be made available for the period to which the owner is entitled by schedule or by a confirmed reservation; and

(11)(A) Procedures for imposing a monetary penalty or suspension of an owner's rights and privileges in the time-share plan for failure of the owner to comply with the time-share instruments or the rules established by the developer concerning the use of the accommodations.

(B) The owner shall be given notice and the opportunity to refute or explain the charges, in person or in writing, to the management advisory board before a decision to impose discipline is rendered.

History. Acts 1983, No. 294, Art. 2, § 2-106; A.S.A. 1947, § 50-1313; Acts 2013, No. 710, § 3.

Amendments. The 2013 amendment substituted "plans" for "programs" in the section heading; substituted "accommodations" for "units" and "plan" for "program" throughout the section; rewrote the introductory language; deleted "providing of"

preceding "maid" in (1); in (5), deleted "and of" following "budget" and substituted "plan or time-share property" for "program"; redesignated (11) as (11)(A) and (B); in (11)(A), deleted "provisions of the" following "comply with the" and substituted "concerning" for "with respect to"; and deleted (12).

18-14-307. Partition of accommodations.

An action for partition of an accommodation shall not be maintained unless permitted by the time-share instrument.

History. Acts 1983, No. 294, Art. 2, § 2-107; A.S.A. 1947, § 50-1314; Acts 2013, No. 710, § 3.

Amendments. The 2013 amendment

substituted "accommodations" for "units" in the section heading; substituted "an accommodation shall not" for "a unit may"; and "unless" for "except as".

18-14-308. Records.

(a) The association or managing agent shall maintain among its records a list of the names and post office addresses of the owners of time-share interests in the time-share plan.

(b) The list shall:

(1) Be updated every six (6) months; and

(2) Not be published or provided to owners or a third person to use or sell the list for commercial purposes.

(c)(1) If an owner of a time-share interest in the time-share plan provides a written request to the association to communicate with its membership, the association shall determine within thirty (30) days of the date of the request whether the communication advances legitimate association business and if so, provide a method to grant the request without disclosing the association membership list to the requesting owner.

(2)(A) The association shall notify the requesting owner of the costs to make the communication before the communication is made to the owners.

(B) The requesting owner shall pay the costs to the association before the association makes the communication.

(3) An alternative method that accomplishes the original purpose of the request made under subdivision (c)(1) of this section is a reasonable alternative.

(4)(A) If the association determines that a communication does not advance legitimate association business, the association shall notify the requesting owner in writing within thirty (30) days of the reasons for the rejection.

(B) An owner that is denied a request for information under subdivision (c)(4)(A) of this section may appeal the denial to the court in whose jurisdiction the association lies.

(C) If the court determines that the communication does advance legitimate association business, the court may order the association to pay the requesting owner's costs, including attorney's fees reasonably incurred to enforce the requesting owner's rights.

History. Acts 2013, No. 710, § 3.

18-14-309. Supervisory authority.

(a) Notwithstanding the obligations imposed on other persons by this chapter, the developer shall supervise, manage, and control the aspects of the offering of a time-share plan, including the promotion, advertising, contracting, and closing.

(b) A violation of this section during the offering is a violation by the developer and the person that committed the violation.

History. Acts 2013, No. 710, § 3.

18-14-310. Out-of-state time-share plan.

(a) A single site time-share plan and component sites of a multisite time-share plan that are located outside the state are to be established and governed by the applicable laws of the state in which the time-share property or component site is located.

(b) If there is a conflict between the affirmative standards stated in the laws of the state or jurisdiction that governs an out-of-state

time-share plan and this subchapter, the law of the state or jurisdiction in which the time-share property is located controls.

(c) If the association and the time-share instruments provide for the matters contained in §§ 18-14-302 — 18-14-306, as applicable, the developer or association is considered to be in compliance with these sections and is not required to revise the time-share instruments to comply with this subchapter.

History. Acts 2013, No. 710, § 3.

SUBCHAPTER 4 — PROTECTION OF PURCHASERS

SECTION.	SECTION.
18-14-401. Penalties.	18-14-407. Escrow accounts — Other financial assurances.
18-14-402. Civil remedies.	18-14-408. Guarantees for completion of time-share properties.
18-14-403. Statute of limitations.	18-14-409. Mutual rights of cancellation.
18-14-404. Required contents of public offering statements for time-share interests.	18-14-410. Liens.
18-14-405. Material changes.	18-14-411. Financial records — Examination.
18-14-406. Other statutes not applicable.	

Effective Dates. Acts 1983, No. 294, § 6-106; Mar. 25, 1983. Emergency clause provided: “It is hereby found and determined by the General Assembly that it is essential to the protection of the residents of this State that provision be made for the sale and regulation of Time-Share Intervals by the Real Estate Commission;

that this Act is designed to provide for such regulation and should be given effect at the earliest possible date. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.”

18-14-401. Penalties.

A developer or any other person subject to this chapter that offers or disposes of a time-share interest without complying with this chapter or that violates this chapter is guilty of a misdemeanor punishable by a fine not to exceed five thousand dollars (\$5,000) per occurrence or by imprisonment not to exceed one (1) year, or both.

History. Acts 1983, No. 294, Art. 3, § 3-108; A.S.A. 1947, § 50-1322; Acts 2013, No. 710, § 4.

Amendments. The 2013 amendment rewrote the section.

18-14-402. Civil remedies.

(a)(1) If a developer or any other person subject to this chapter violates this chapter or a project instrument, a person or class of persons adversely affected by the violation has a claim for appropriate relief.

(2) Punitive damages or attorney's fees, or both, may be awarded for willful violation of this chapter.

(b) Section 17-42-401 et seq. does not apply to any claims arising from or damages caused by a violation of this chapter, the Real Estate License Law, § 17-42-101 et seq., or rules by a licensee while engaged in a time-share activity.

History. Acts 1983, No. 294, Art. 3, § 3-108; A.S.A. 1947, § 50-1322; Acts 1989, No. 45, § 2; 1991, No. 786, § 27; 2013, No. 710, § 4.

Publisher's Notes. Acts 1989, No. 45, § 3, provided that the Arkansas Real Estate Commission may promulgate such regulations as it deems necessary for the implementation of this act.

Acts 1991, No. 786, § 37, provided: "The enactment and adoption of this Act shall not repeal, expressly or impliedly, the acts passed at the regular session of the 78th General Assembly. All such acts shall have full effect and, so far as those acts inten-

tionally vary from or conflict with any provision contained in this Act, those acts shall have the effect of subsequent acts and as amending or repealing the appropriate parts of the Arkansas Code of 1987."

Amendments. The 2013 amendment subdivided (a) as (a)(1) and (a)(2); in (a)(1), substituted "this chapter or a project instrument, a" for "any provision thereof or any provision of the project instruments, any" and deleted "or violations" following "violation"; and rewrote (b).

18-14-403. Statute of limitations.

(a) A judicial proceeding in which the accuracy of the public offering statement or validity of a contract of purchase is in issue and a rescission of the contract or damages is sought shall be commenced not later than four (4) years after the date of the contract of purchase, notwithstanding that the purchaser's terms of payment may extend beyond the period of limitation.

(b) If the enforcement of provisions in the contract of purchase requires the continued furnishing of services and the reciprocal payments to be made by the purchaser, the period of bringing a judicial proceeding will continue for a period of four (4) years for each breach, but the parties may agree to reduce the period of limitation to not less than two (2) years.

History. Acts 1983, No. 294, Art. 3, § 3-109; A.S.A. 1947, § 50-1323; Acts 2013, No. 710, § 4.

Amendments. The 2013 amendment redesignated the paragraph as (a) and (b); substituted "shall be commenced not later

than" for "must be commenced within" in (a); and substituted "If the enforcement of provisions in the contract of purchase requires" for "However, with respect to the enforcement of provisions in the contract of purchase which require" in (b).

CASE NOTES

Action Timely.

An action arising from a hotel's revocation of a license agreement that allowed time-share owners access to the hotel's parking and recreational facilities and also terminated the time-share owners's utilities was timely as the action was

appropriately viewed as an attempt to enforce contract provisions that required the continued furnishing of services, and the action was commenced within four years of breach. *Kessler v. National Enters., Inc.*, 238 F.3d 1006 (8th Cir. 2001).

In a class action suit against a devel-

oper seeking restitution and rescission of the owners' purchase contracts and alleging claims of misrepresentation and breach of contract, this section controlled over the general limitations statute, § 16-56-105; otherwise, the owners' right to seek relief would have terminated before

any injury was known to them, contrary to the General Assembly's intention to protect consumers under the Time-Share Act. *Nat'l Enters., Inc. v. Kessler*, 363 Ark. 167, 213 S.W.3d 597 (2005), cert. denied, 546 U.S. 1174, 126 S. Ct. 1340, 164 L. Ed. 2d 55 (2006).

18-14-404. Required contents of public offering statements for time-share interests.

(a) A public offering statement shall be provided to each purchaser of a time-share interest and may be delivered by hard copy or electronically, including a CD, DVD, thumb drive, or other electronic media agreeable to the purchaser. The public offering statement shall fully and accurately disclose:

(1) The name of the developer, its principal address, and the time-share plan offered in the statement;

(2) A general description of the accommodations, including, without limitation, the developer's schedule of commencement and completion of all buildings, accommodations, and amenities or, if completed, that the buildings, accommodations, and amenities have been completed;

(3) As to the accommodations offered by the developer in the time-share plan:

(A) The types and number of accommodations by location, if applicable;

(B) Identification of accommodations that are subject to time-share interests; and

(C) The estimated number of accommodations that may become subject to time-share interests;

(4) A brief description of the time-share plan;

(5)(A) If applicable, the current budget and a projected budget for the time-share interests for one (1) year after the date of the first transfer to a purchaser.

(B) The budget shall include, without limitation:

(i) A statement of the amount included in the budget as a reserve for repairs and replacement;

(ii) The projected common expense liability, if any, by category or expenditures for the time-share interests;

(iii) The total annual projected common expense liability for all time-share interests in the time-share plan; and

(iv) A statement of any services not shown in the budget that the developer provides or expenses that it pays;

(6) Any initial or special fee due from the purchaser at closing with a description of the purpose and method of calculating the fee;

(7) A description of any liens, defects, or encumbrances on or affecting the title to any of the time-share interests;

(8) A description of any financing offered by the developer;

(9) A statement that within five (5) days after execution of a contract of purchase a purchaser may cancel any contract for purchase of time-share interests from the developer;

(10) A statement of any pending suits material to the time-share interests of which the developer has actual knowledge;

(11) Any restraints on alienation of any number or part of any of the time-share interests;

(12) A description of the insurance coverage that is for the benefit of the owners of time-share interests;

(13) Any current or expected fees or charges to be paid by time-share interest owners for the use of any facilities related to any of the time-share property;

(14) The extent to which financial arrangements have been provided for completion of the promised improvements; and

(15) The extent to which a time-share accommodation may become subject to a tax or other lien arising out of claims against other owners of the accommodation.

(b)(1) If a purchaser is offered the opportunity to subscribe to any program that provides exchanges of time-shares among purchasers in either the same time-sharing plan or other time-sharing plans, or both, the developer shall deliver to the purchaser before the execution of a contract between the purchaser and the company offering the exchange program, written information concerning the exchange program, which information may be delivered by hard copy or electronically.

(2) The purchaser shall certify in writing to the receipt of the information that includes:

(A) The name and address of the exchange program;

(B) The names of the officers and directors;

(C) Whether the exchange program, or any of its officers or directors, has a legal or beneficial interest in any developer or managing agent for a time-share plan participating in the exchange program and, if so, the name and location of the time-share plan and the nature of the interest;

(D) Unless otherwise stated, a statement that the purchaser's contract with the exchange program is a contract separate and distinct from the purchaser's contract with the developer;

(E) Whether the purchaser's participation in the exchange program is dependent upon the continued affiliation of the time-share project with the exchange program;

(F) Whether the purchaser's membership or participation, or both, in the exchange program is voluntary or mandatory;

(G) A complete and accurate description of the terms and conditions of the purchaser's contractual relationship with the exchange program and the procedure by which changes may be made;

(H) A complete and accurate description of the procedure to qualify for and carry out exchanges;

(I) A complete and accurate description of the limitations, restrictions, or priorities used in the operation of the exchange program,

including limitations on exchanges based on seasonality, accommodation size, or levels of occupancy that are expressed in bold-faced type and if limitations, restrictions, or priorities are not uniformly applied by the exchange program, a clear description of the way in which they are applied;

(J) Whether exchanges are arranged on a space-available basis and whether any guarantees of fulfillment of specific requests for exchanges are made by the exchange program;

(K) Whether and under what circumstances, a purchaser, in dealing with the exchange program, may lose the use and occupancy of his or her time-share in any exchange properly applied for without his or her being provided with substitute accommodations by the exchange program;

(L) The fees or range of fees for participation by purchasers in the exchange program, a statement whether such fees may be altered by the exchange company, and the circumstances under which alterations may be made;

(M) The name and address of the site of each accommodation or facility included in the time-share properties that are participating in the exchange program as of the last annual review or audit;

(N) The number of time-share accommodations in each time-share property that are available for occupancy, under the last annual review or audit, and that qualify for participation in the exchange program, expressed in numerical groupings: 1-5, 6-10, 11-20, 21-50, and 51 and over;

(O) The number of purchasers enrolled for each time-share plan participating in the exchange program, under the last annual review or audit, expressed in numerical groupings: 1-100, 101-249, 250-499, 500-999, and 1,000 and over, and a statement of the criteria used to determine those purchasers that are enrolled with the exchange program;

(P) The disposition made by the exchange company of time-shares deposited with the exchange program by purchasers enrolled in the exchange program and not used by the exchange company in making changes;

(Q) The information required in this subdivision (b)(2)(Q) shall be independently reviewed or audited by a certified public accountant or accounting firm according to the standards of the Financial Accounting Standards Board and annually reported:

(i) The number of purchasers currently enrolled in the exchange program;

(ii) The number of accommodations and facilities that have current written affiliation agreements with the exchange program;

(iii) The percentage of confirmed exchanges that are the number of exchanges confirmed by the exchange program divided by the number of exchanges properly applied for, together with a complete and accurate statement of the criteria used to determine whether an exchange request was properly applied for;

(iv) The number of time-share periods for which the exchange program has an outstanding obligation to provide an exchange to a purchaser who relinquished a time-share during the year in exchange for a time-share in any future year; and

(v) The number of exchanges confirmed by the exchange program during the year; and

(R)(i) A statement in boldface type to the effect that the percentage described in subdivision (b)(2)(Q)(iii) of this section is a summary of the exchange requests entered with the exchange program in the period reported.

(ii) The percentage does not indicate a purchaser's probabilities of being confirmed to a specific choice or range of choices, since availability at individual locations may vary.

(c) Each exchange company offering an exchange program to purchasers in this state shall include the statement in subdivision (b)(2)(R) of this section on all promotional brochures, pamphlets, advertisements, or other materials distributed by the exchange company that contains the percentage in subdivision (b)(2)(Q)(iii) of this section.

(d)(1) A developer may satisfy the requirements of this section by delivery to purchasers of materials furnished to the developer by the exchange program if the exchange program has certified to the developer that the materials satisfy the requirements of this section.

(2) A developer has no liability to a person if the materials furnished by the exchange program fail to comply with this section.

History. Acts 1983, No. 294, Art. 3, § 3-101; A.S.A. 1947, § 50-1315; Acts 2013, No. 710, § 4.

Amendments. The 2013 amendment rewrote the section.

18-14-405. Material changes.

(a) The developer shall amend or supplement the public offering statement to report any material change in the information required by § 18-14-404.

(b) The developer shall use the written materials that are supplied to it by an exchange program for distribution to the time-share interest owners as the materials are received.

History. Acts 1983, No. 294, Art. 3, § 3-106; A.S.A. 1947, § 50-1320; Acts 2013, No. 710, § 4.

Amendments. The 2013 amendment redesignated the paragraph as (a) and (b); and, in (b), inserted "by an exchange pro-

gram", deleted "As to any exchange program" from the beginning, deleted "current" preceding "written", and substituted "interest owners as the materials are" for "interval owners as it is".

18-14-406. Other statutes not applicable.

(a) A time-share plan in which a public offering statement is prepared under this chapter does not require registration under any of the following:

(1) Arkansas Securities Act, § 23-42-101 et seq.; or

(2) Any other Arkansas statute that requires a public offering statement or substantially similar document for distribution to purchasers.

(b)(1) A time-share plan that fails to restrict the price at which an owner may sell or exchange his or her time-share interest does not by that failure cause the time-share interest to become a security under the Arkansas Securities Act, § 23-42-101 et seq.

(2) An exchange agent offering a time-share interest for exchange is not considered to be offering a security under the Arkansas Securities Act, § 23-42-101 et seq.

History. Acts 1983, No. 294, Art. 3, § 3-105; A.S.A. 1947, § 50-1319; Acts 2013, No. 710, § 4.

Amendments. The 2013 amendment substituted “plan” for “program” throughout the section; deleted “the preparation of” preceding “a public offering statement” in (a)(2); redesignated (b) as (b)(1) and

(b)(2); in (b)(1), substituted “interest does not by that” for “interval shall not by virtue of such” and “interest” for “interval”; and, in (b)(2), substituted “interest” for “interval”, “is not considered” for “shall not be construed” and “the Arkansas Securities Act, § 23-42-101 et seq.” for “such act”.

18-14-407. Escrow accounts — Other financial assurances.

(a) Any deposit made with the purchase or reservation of a time-share interest from a developer shall be placed in a noninterest-bearing escrow account and held in this state, or other jurisdiction that is acceptable to the Arkansas Real Estate Commission, in a designated account by an independent bonded escrow company or in an institution whose accounts are insured by a governmental agency or instrumentality until:

(1) Delivered to the developer at the end of the time for rescission or a later time specified in a contract or sale;

(2) Delivered to the developer because of the purchaser’s default under a contract to purchase the time-share interest; or

(3) Refunded to the purchaser.

(b)(1) In lieu of any escrows required by this section, the commission has the discretion to accept other financial assurances, including a surety bond, or a cash deposit in an amount equal to the escrow requirements of this section.

(2) Interest earned on a surety bond or other deposit while deposited with, or for the benefit of, the commission becomes the property of the commission and is deposited into the Real Estate Recovery Fund in § 17-42-403.

History. Acts 1983, No. 294, Art. 3, § 3-102; A.S.A. 1947, § 50-1316; Acts 1989, No. 44, § 2; 2013, No. 710, § 4.

Publisher’s Notes. Acts 1989, No. 44, § 4, provided that the Arkansas Real Estate Commission may promulgate such regulations as it deems necessary for the implementation of this act.

Amendments. The 2013 amendment

substituted “Other” for “or other” in the section heading; substituted “interest” for “interval” throughout the section; in (a), deleted “in connection” following “Any deposit made” and substituted “or other jurisdiction that is acceptable to the Arkansas Real Estate Commission in a designated account” for “in an account designated solely for the purpose”; substi-

tuted "end" for "expiration" in (a)(1); in (b)(1), substituted "commission has" for "agency shall have", deleted "but not limited to" preceding "a surety bond", and deleted "an irrevocable letter of credit" following "surety bond"; and, in (b)(2), substituted "a surety bond" for "any such bond", "commission becomes" for "agency shall become", "commission" for "agency", substituted "is deposited into" for "shall be deposited in" and deleted "created" preceding "in § 17-42-203".

18-14-408. Guarantees for completion of time-share properties.

(a)(1) If a developer contracts to sell a time-share interest and the construction, furnishings, and landscaping of the time-share property have not been substantially completed according to the representations made by the developer in the disclosures under this chapter, the developer shall pay into an escrow account established and held in this state, in an account designated solely for the purpose, by an independent bonded escrow company, or in an institution whose accounts are insured by a governmental agency or instrumentality, a payment received by the developer from the purchaser towards the sale price until the time-share property is substantially complete.

(2) The escrow agent may invest the escrow funds in securities for the United States, any agency thereof, or in savings or time deposits in institutions insured by an agency of the United States.

(3) Funds are released from escrow as follows:

(A) If a purchaser properly terminates the contract under its terms or this chapter, the funds shall be paid to the purchaser, together with any interest earned;

(B) If the purchaser defaults in the performance of his or her obligations under the contract of purchase and sale, the funds shall be paid to the developer, together with any interest earned; or

(C) If the funds of a purchaser have not been previously disbursed under subdivision (a)(1) of this section, they may be disbursed to the developer by the escrow agent upon substantial completion of the time-share property.

(4)(A) The developer is not required to comply with subdivision (a)(1) of this section if the commission is satisfied that all of the following conditions are met:

(i) The developer is an Arkansas corporation or a foreign corporation qualified to do business in Arkansas;

(ii) The corporation has been in existence and operated in this state for at least three (3) years; and

(iii) The corporation has net assets within this state of at least three (3) times the cost to complete the time-share property.

(B) The commission may require other assurances as may reasonably be required either to assure completion of the time-share property or to reimburse the purchaser the funds paid to the developer, together with any interest earned.

(5)(A) In lieu of the escrow required by subdivision (a)(1) of this section, the commission may accept other financial assurances, including a performance bond equal to the cost to finish the time-share property.

(B) Interest earned on the performance bond under subdivision (a)(5)(A) of this section, deposit, or other instrument while deposited with or for the benefit of the commission shall become the separate property of the commission and be deposited into the Real Estate Recovery Fund under § 17-42-403.

(b) For the purpose of this section, “substantially completed” means that the amenities, furnishings, appliances, and structural components and mechanical systems of buildings on the real property dedicated to the time-share plan and subject to the project instruments are completed and provided as represented in the public offering statement, that the premises are ready for occupancy, and that the proper governmental authority has issued a certificate of occupancy or its equivalent.

History. Acts 1983, No. 294, Art. 3, § 3-103; A.S.A. 1947, § 50-1317; Acts 1989, No. 44, § 3; 2013, No. 710, § 4.

Publisher’s Notes. Acts 1989, No. 44, § 4, provided that the Arkansas Real Es-

tate Commission may promulgate such regulations as it deems necessary for the implementation of this act.

Amendments. The 2013 amendment rewrote the section.

18-14-409. Mutual rights of cancellation.

(a)(1) Before transfer of a time-share interest and no later than the date of the sales contract, the developer shall provide the intended purchaser with a copy of the public offering statement and any amendments and supplements to the statement.

(2) The contract is voidable by the purchaser until he or she has received the public offering statement.

(3) The contract is voidable by the purchaser for five (5) days after execution of the contract of sale.

(4) Cancellation is without penalty, and all payments made by the purchaser before cancellation shall be refunded within a reasonable time after receipt of the notice of cancellation under subsection (c) of this section.

(b) Up to five (5) days after execution of the contract of sale, the developer may cancel the contract of purchase without penalty to either party and shall return all payments made within a reasonable time.

(c) If either party elects to cancel a contract under subsection (a) or subsection (b) of this section, he or she may do so by hand-delivering the notice to the other party or by mailing the notice by regular mail to the other party or to his or her agent for service of process, which notice is considered given when deposited in the mail.

History. Acts 1983, No. 294, Art. 3, § 3-104; A.S.A. 1947, § 50-1318; Acts 2013, No. 710, § 4.

Amendments. The 2013 amendment redesignated (a) as (a)(1) through (4); in (a)(1), substituted “interest” for “interval” and “purchaser” for “transferee”; deleted “In addition” from the beginning of (a)(3);

substituted “and shall return all payments made within a reasonable time” for “The developer shall return all payments made and the purchaser shall return all materials received in good condition, reasonable wear and tear excepted. If the materials are not returned, the developer may deduct the cost of them and return

the balance to the purchaser" in (b); in (c), substituted "regular" for "prepaid United States", substituted "is considered" for "shall be deemed", and deleted "United States" preceding "mail" at the end; and made stylistic changes.

18-14-410. Liens.

(a)(1) Before a transfer of a time-share interest, the developer shall record or furnish to the purchaser releases of all liens affecting that time-share interest or shall provide a surety bond or other insurance against the lien from a company acceptable to the Arkansas Real Estate Commission; or

(2) An underlying lien shall contain a provision in which the lienholder subordinates its rights to that of a time-share purchaser who fully complies with the contract of sale.

(b)(1) If a lien other than a mortgage or deed of trust becomes effective against more than one (1) time-share interest in a time-share property, a time-share interest owner may get a release of his or her time-share interest from the lien upon payment of the amount of the lien attributable to his or her time-share interest unless a time-share interest owner or his or her predecessor in title agrees otherwise with the lienor.

(2) The payment shall be proportionate to the ratio that the time-share interest owner's liability bears to the liabilities of all time-share interest owners whose interests are subject to the lien.

(3) Upon receipt of payment, the lienholder shall promptly deliver to the time-share interest owner a release of the lien covering that time-share interest.

(4) After payment, the managing entity shall not assess or have a lien against that time-share interest for any part of the expenses incurred with that lien.

History. Acts 1983, No. 294, Art. 3, § 3-107; A.S.A. 1947, § 50-1321; Acts 2013, No. 710, § 4. **Amendments.** The 2013 amendment rewrote the section.

CASE NOTES

Cited: Dogpatch Properties, Inc. v. Dogpatch U.S.A., Inc., 810 F.2d 782 (8th Cir. 1987).

18-14-411. Financial records — Examination.

(a) The person or entity responsible for making or collecting common expense assessments or maintenance assessments shall keep detailed financial records.

(b) All financial and other records shall be made reasonably available for examination by any time-share interest owner and his or her authorized agents.

History. Acts 1983, No. 294, Art. 3, § 3-110; A.S.A. 1947, § 50-1324; Acts 2013, No. 710, § 4.

Amendments. The 2013 amendment substituted "interest" for "interval" in (b).

SUBCHAPTER 5 — ADVERTISING

SECTION.

18-14-501. Filing of advertising materials.

18-14-502. False advertising declared unlawful.

SECTION.

18-14-503. Prohibited advertising.

18-14-504. Unfair acts or practices.

18-14-505. Enforcement.

Effective Dates. Acts 1983, No. 294, § 6-106: Mar. 25, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that it is essential to the protection of the residents of this State that provision be made for the sale and regulation of Time-Share Intervals by the Real Estate Commission; that this Act is designed to provide for such regulation and should be given effect at the earliest possible date. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1983, No. 765, § 8: Mar. 24, 1983. Emergency clause provided: "It is hereby

found and determined by the General Assembly that various provisions of Act 294 of 1983 relating to the regulation of real estate time-share intervals by the Arkansas Real Estate Commission are in urgent need of revision to enable the Commission to effectively and efficiently administer the provisions of the Act; that this Act is designed to make the necessary revisions and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

18-14-501. Filing of advertising materials.

(a) All advertising materials proposed for use or used in this state by a person with the offer or sale of a time-share property are subject to the review of the Arkansas Real Estate Commission upon its request.

(b) Advertising materials include:

(1) Promotional brochures, pamphlets, advertisements, or other materials to be distributed to the public concerning the sale of time-shares;

(2) Transcripts of all radio and television advertisements;

(3) Offers of travel, accommodations, meals, or entertainment at no cost or reduced cost;

(4) Direct mail solicitation;

(5) Advertising, including testimonials or endorsements;

(6) Scripts or standardized narrative for use in making telephone solicitations; and

(7) Websites or other electronic media.

History. Acts 1983, No. 294, Art. 6, § 6-102; 1983, No. 765, § 6; A.S.A. 1947, § 50-1335; Acts 2013, No. 710, § 5.

Amendments. The 2013 amendment rewrote (a); deleted former (b) and redesignated (c) as present (b); deleted “but are

not limited to, the following” from the end of the introductory language of (b); substituted “distributed to the public concerning” for “disseminated to the public in connection with” in (b)(1); and added (b)(7).

18-14-502. False advertising declared unlawful.

(a) It is unlawful for a person with intent, directly or indirectly, to offer for sale or sell time-shares in this state or to authorize, use, direct, or aid in the publication, distribution, or circulation of an advertisement, radio broadcast, telecast, or other electronic media concerning the time-share plan in which the time-share properties are offered that contains a statement, pictorial representation, or sketch that is false or misleading.

(b) This section does not hold the publisher or employee of a newspaper, a job printer, a broadcaster or telecaster, or a magazine publisher, or an employee thereof, liable for the publication referred to in this section unless the publisher, employee, or printer has actual knowledge of its falsity or has an interest as an owner or agent in the time-share plan advertised.

History. Acts 1983, No. 294, Art. 6, § 6-101; A.S.A. 1947, § 50-1334; Acts 2013, No. 710, § 5.

Amendments. The 2013 amendment rewrote the section.

18-14-503. Prohibited advertising.

An advertisement for the offer or sale of time-shares shall not:

(1) Contain a representation concerning the availability of a resale program or rental program offered by or on behalf of the developer or its affiliate unless the resale program or rental program has been made a part of the offering and submitted to the Arkansas Real Estate Commission;

(2) Contain an offer or inducement to purchase that limits the quantity or time of availability, unless the numerical quantity or time applicable to the offer or inducement is clearly and conspicuously disclosed;

(3) Contain a statement concerning the investment merit or profit potential of the time-share, unless the commission has determined that the representation is neither false nor misleading;

(4) Make a prediction of or imply specific or immediate increases in the price or value of the time-share property, nor shall a price increase of a time-share property be promoted unless the developer has authorized and announced the price increase;

(5) Contain statements concerning the availability of time-share interests at a particular minimum price if the number of time-share interests available at that price comprises less than ten percent (10%) of the unsold inventory of the developer, unless the number of time-

share interests then for sale at the minimum price is stated in the advertisement;

(6) Contain a statement that the time-share interest being offered for sale can be further divided, unless a full disclosure is included concerning the legal requirements for further division of the time-share interest;

(7) Contain an asterisk or other reference symbol as a means of contradicting or changing the ordinary meaning of a previously made statement in the advertisement;

(8) Misrepresent the size, nature, extent, qualities, or characteristics of the accommodations or facilities that comprise the time-share plan;

(9) Misrepresent the nature or extent of a service incident to the time-share project;

(10) Misrepresent or imply that a facility or service is available for the exclusive use of purchasers or owners if a public right of access or of use of the facility or service exists;

(11) Make a misleading or deceptive representation concerning the contents of the time-share permit, the purchase contract, the purchaser's rights, privileges, benefits, or obligations under the purchase contract or this chapter;

(12) Misrepresent the conditions under which a purchaser or owner may participate in an exchange program; or

(13) Describe a proposed or unfinished private facility over which the developer has no control, unless the estimated date of completion is stated and evidence has been presented to the commission that the completion and operation of the facilities are reasonably assured within the time represented in the advertisement.

History. Acts 1983, No. 294, Art. 6, § 6-103; A.S.A. 1947, § 50-1336; Acts 2013, No. 710, § 5.

Amendments. The 2013 amendment substituted "commission" for "agency" and "time-share interests" for "time-shares" throughout the section; substituted "Arkansas Real Estate Commission" for "agency" in (1); rewrote (2); deleted "from evidence submitted on behalf of the developer" following "determined" in (3); in (4),

substituted "time-share property" for "time-shares" and substituted "property be promoted unless the developer has authorized and announced the price increases" for "be announced more than sixty (60) days prior to the date that the increase will be placed into effect"; substituted "plan" for "project" in (8); substituted "unfinished" for "uncompleted" in (13); and made stylistic changes.

18-14-504. Unfair acts or practices.

(a) It is unlawful for a person to offer by mail, telephone, electronic media, or in person a prize or gift, with the intent to offer a sales presentation for a time-share plan, without also disclosing in a clear and unequivocal way that there will be a sales presentation when making the offer of the prize or gift.

(b) The following unfair acts or practices undertaken by, or omissions of, a person in the operation of a prize or gift promotional offer for a time-share plan are prohibited:

(1) Failing to clearly and conspicuously disclose the rules, terms, and conditions of the promotional program, a description of the prizes offered, if any, and the date that the prize or gift offer will terminate or expire;

(2)(A) Failing to disclose the retail value of the gift or prize and the odds of winning.

(B) The person making the offer shall maintain a sufficient inventory of the gift or prize to be able to equal the reasonable response to the offer;

(3) Failing to obtain the express written or oral consent of individuals before their names are used for a promotional purpose with a mailing to a third person;

(4)(A) Failing to award and distribute at least one (1) of each prize or gift of the value and type represented in the promotional program by the day and year specified in the promotion.

(B) If a promotion promises the award of a prescribed number of each prize, this number of prizes shall be awarded by the date and year specified in the promotion; or

(5) Misrepresenting in any way the odds of receiving a prize or gifts or the rules, terms, or conditions of participation in the promotional program.

History. Acts 1983, No. 294, Art. 6, § 6-104; A.S.A. 1947, § 50-1337; Acts 2013, No. 710, § 5.

Amendments. The 2013 amendment rewrote (a); substituted “plan” for “project” in (b); in (b)(1), deleted “regulations” following “rules” and substituted “that”

for “on or before which”; redesignated (b)(2) as (b)(2)(A) and (b)(2)(B); deleted “in connection” following “purpose” in (b)(3); redesignated (b)(4) as (b)(4)(A) and (b)(4)(B); substituted “any way” for “any manner” in (b)(5); and made stylistic changes.

18-14-505. Enforcement.

If the Arkansas Real Estate Commission determines that a person is violating or failing to comply with the requirements of this subchapter, the commission may order the person to cease and desist from the violations and may take enforcement action under § 18-14-201 et seq.

History. Acts 1983, No. 294, Art. 6, § 6-105; A.S.A. 1947, § 50-1338; Acts 2013, No. 710, § 5.

Amendments. The 2013 amendment rewrote the section.

SUBCHAPTER 6 — FINANCING

SECTION.

18-14-601. Financing of time-share plans.

18-14-602. Protection of purchasers from

subsequent underlying lien.

Effective Dates. Acts 1983, No. 294, § 6-106; Mar. 25, 1983. Emergency clause

provided: “It is hereby found and determined by the General Assembly that it is

essential to the protection of the residents of this State that provision be made for the sale and regulation of Time-Share Intervals by the Real Estate Commission; that this Act is designed to provide for such regulation and should be given effect

at the earliest possible date. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

18-14-601. Financing of time-share plans.

(a) In the financing of a time-share plan, the developer and its successors in interest shall retain financial records of the schedule of payments required to be made and the payments made to a person or entity that is the lienholder of an underlying blanket mortgage, deed of trust, contract of sale, or other lien or encumbrance.

(b) Any transfer of the developer's interest in the time-share plan to a third person is subject to the obligations of the developer to the extent the obligations were originally established in written documents recorded in the real estate records and not existing solely from the offering of materials or filings with a governmental authority.

History. Acts 1983, No. 294, Art. 5, § 5-101; A.S.A. 1947, § 50-1332; Acts 2013, No. 710, § 6.

Amendments. The 2013 amendment substituted "plans" for "programs" in the section heading; and "plan" for "program" throughout the section; designated the existing paragraph as (a) and (b); inserted

"and its successors in interest" in (a); and added "to the extent the obligations were originally established in written documents recorded in the real estate records and not existing solely from the offering of materials or filings with a governmental authority" at the end of (b).

CASE NOTES

Successors.

When a developer's interests in a project are transferred to a third party, the transferee must acquire not only the interest in the property, but also all the other obligations of the developer with respect to the time-share regime. *Kessler v. National Enters., Inc.*, 238 F.3d 1006 (8th Cir. 2001).

In a dispute brought by condominium owners against corporations who were successors-in-interest to the original developers, the trial court did not err in ruling on the owner's cross-motion for summary judgment on the issue of liability before the class members were noticed as the corporations waived the issue of notice, and this section was quite clear that the obligations of the original developers remained in place. *Nat'l Enters., Inc. v. Kessler*, 363 Ark. 167, 213 S.W.3d

597 (2005), cert. denied, 546 U.S. 1174, 126 S. Ct. 1340, 164 L. Ed. 2d 55 (2006).

Developer was a successor-in-interest to the initial developer, and this section adhered to the purpose of the Time-Share Act by assuring that the original developer's obligations to the owners were not abandoned. *Nat'l Enters., Inc. v. Kessler*, 363 Ark. 167, 213 S.W.3d 597 (2005), cert. denied, 546 U.S. 1174, 126 S. Ct. 1340, 164 L. Ed. 2d 55 (2006).

Summary judgment was properly awarded to a title insurance company and a title company in property owner's action for breach of a title insurance policy where the loss in real estate value as a result of purchaser's potential liability as a successor-in-interest under the Arkansas Time-Share Act did not constitute a "defect" in title for purposes of title insurance. *First United, Inc. v. Chicago Title Ins. Co.*, 366 Ark. 508, 237 S.W.3d 15 (2006).

Cited: National Enters., Inc. v. Rea, 329 Ark. 332, 947 S.W.2d 378 (1997).

18-14-602. Protection of purchasers from subsequent underlying lien.

The developer whose project is subjected to an underlying blanket lien or encumbrance subsequent to the transfer of a time-share interest shall protect nondefaulting purchasers from foreclosure by:

(1) Obtaining from the lienholder a nondisturbance clause, subordination agreement, or partial release of the lien for those time-share interests sold; or

(2) Providing a surety bond or insurance against the lien from a company acceptable to the Arkansas Real Estate Commission.

History. Acts 1983, No. 294, Art. 5, § 5-102; A.S.A. 1947, § 50-1333; Acts 2013, No. 710, § 6. **Amendments.** The 2013 amendment rewrote the section.

SUBCHAPTER 7 — CAMPING SITES

SECTION.

18-14-701. Definition.

18-14-702. Camping site — Buyer's right to cancel.

SECTION.

18-14-703. Seller to provide notice of cancellation — Form.

A.C.R.C. Notes. References to "this chapter" in subchapters 1-6 may not apply to this subchapter which was enacted subsequently.

18-14-701. Definition.

As used in this subchapter, "time-share plan" shall have the same meaning as used in § 18-14-102.

History. Acts 1991, No. 619, § 1; 2013, No. 710, § 7. substituted "plan" for "program" and "used" for "provided".

Amendments. The 2013 amendment

18-14-702. Camping site — Buyer's right to cancel.

(a) In addition to any other right to revoke an offer, the buyer has the absolute right to cancel a contract or offer for the purchase of a camping site under a time-share plan until midnight of the fifth calendar day after the day that the buyer signs an agreement, excluding Sundays and the holidays under § 1-5-101.

(b) Cancellation occurs if the buyer returns to the seller the notice of cancellation provided by the seller.

(c) The notice of cancellation may be sent by registered mail.

History. Acts 1991, No. 619, § 2; 2013, No. 710, § 7.

Amendments. The 2013 amendment added “Camping site” to the section heading; in (a), substituted “plan” for “program”, deleted “excluding Sundays and

holidays as declared in § 1-5-101” preceding “after the day”, and added “excluding Sundays and the holidays under § 1-5-101”; substituted “provided by” for “the notice having been provided for the buyer” in (b); and rewrote (c).

18-14-703. Seller to provide notice of cancellation — Form.

(a) The seller of a camping site under a time-share plan shall furnish to the buyer at the time the buyer signs the sales contract or otherwise agrees to buy the camping site a complete form in duplicate captioned “NOTICE OF CANCELLATION”, which is attached to the contract or receipt, is easily detachable, and contains in 10-point bold-face type, the following information and statements:

“NOTICE OF CANCELLATION

Enter date of transaction

You are entitled to cancel the agreement or offer at any time before midnight of the fifth day, excluding Sundays and holidays, after the day you signed the agreement or offer. If you cancel, the seller must return to you (1) any payments made; (2) any goods or other property (or a sum equal to the amount of the trade-in allowance given therefore); and (3) any note or other evidence of indebtedness, given by you to the seller under or with the agreement or offer.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE TO

(Name of seller)

.....

(Address of seller’s place of business)

NOT LATER THAN MIDNIGHT OF

(Date)

I HEREBY CANCEL THIS TRANSACTION

(Date)

.....

(Buyer’s signature)”.
(b) If seller fails to give both oral and written notice of the buyer’s right to cancellation, the cooling-off period does not begin to run until actual notice is given.

History. Acts 1991, No. 619, § 3; 2013, No. 710, § 7.

Amendments. The 2013 amendment in the first paragraph of (a), substituted “plan shall” for “program must”, “camping site” for “campsite” and substituted “contains” for “which shall contain”; and in the

second paragraph of (a), substituted “offer at any time before midnight” for “offer referred to above at any time prior to midnight”, “If” for “in the event”, and “under or” for “pursuant to or in connection”.

CHAPTER 15

EMINENT DOMAIN

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. COUNTIES AND MUNICIPAL CORPORATIONS GENERALLY.
3. MUNICIPAL CORPORATIONS GENERALLY.
4. MUNICIPAL CORPORATIONS — WATERWORKS SYSTEMS.
5. ELECTRIC COMPANIES GENERALLY.
6. MUNICIPAL CORPORATIONS — WATER AND WATER-GENERATED ELECTRIC COMPANIES.
7. DAMS, MILLS, ETC.
8. NAVIGATION, COAL, AND STONE COMPANIES.
9. PUBLIC LANDINGS.
10. LEVEE AND DRAINAGE DISTRICTS.
11. IRRIGATION COMPANIES.
12. RAILROAD, TELEGRAPH, AND TELEPHONE COMPANIES.
13. MINERAL OIL, PETROLEUM, NATURAL GAS, AND LUMBER COMPANIES.
14. CEMETERIES.
15. HOUSING AND URBAN RENEWAL.
16. TRACTION COMPANIES.
17. PRIVATE PROPERTY PROTECTION ACT.

Cross References. Common carriers
— Eminent domain, § 23-15-101.

RESEARCH REFERENCES

ALR. Measure and elements of damages or compensation for condemnation of public transportation system. 35 A.L.R.4th 1263.

Am. Jur. 26 Am. Jur. 2d, Em. Dom., § 1 et seq.

Ark. L. Rev. Condemnation of Leased Property in Arkansas, 14 Ark. L. Rev. 326.

Reimbursement of Attorney's Fees in Arkansas Upon Dismissal of Condemnation Proceedings, 22 Ark. L. Rev. 181.

C.J.S. 29A C.J.S., Em. Dom., § 1 et seq.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 18-15-101. Deduction from compensation of taxes due on real property.
- 18-15-102. Actions against corporations appropriating private property.

SECTION.

- 18-15-103. Bill of rights — Property owner.

Cross References. Relocation assistance and payments to persons displaced due to project financed with federal funds, § 22-9-701 et seq.

Right of eminent domain, Ark. Const., Art. 17, § 9.

State's ancient right of eminent domain conceded, Ark. Const., Art. 2, § 23.

Taking without just compensation prohibited, Ark. Const., Art. 2, § 22.

Preambles. Acts 1893, No. 149 contained a preamble which read: "Whereas,

the constitution provides that no property or right-of-way shall be appropriated to the use of any corporation until full compensation therefor shall be first made, or secured to the owner, which compensation shall be ascertained by a jury of twelve men in a court of competent jurisdiction,

as prescribed by law, and

"Whereas, the statutes of this state provide no remedy for the owner to obtain damages for property taken for public use...."

Effective Dates. Acts 1893, No. 149, § 2: effective on passage.

18-15-101. Deduction from compensation of taxes due on real property.

(a) When the State of Arkansas or any of its agencies or departments shall purchase or take by eminent domain any real property for any purpose and any ad valorem taxes are due, or will become due, during the calendar year in which the purchase or taking occurs, then the state or its agencies or departments purchasing or taking the real property shall withhold from the compensation therefor the amount of the taxes so due, or to become due, during the calendar year and shall remit them to the tax collector of the county in which the real property is located.

(b) If the state or any of its agencies or departments shall fail to withhold and pay the tax upon real property as required pursuant to this section, the county in which the property is located shall be entitled to file a claim with the Arkansas State Claims Commission and to recover the amount of taxes on property purchased or taken by eminent domain as provided in this chapter from the state or its agency or department failing to comply with this section.

History. Acts 1969, No. 54, § 1; A.S.A. 1947, § 35-102.1.

Cross References. State purchasing generally, § 19-11-101 et seq.

18-15-102. Actions against corporations appropriating private property.

(a) Whenever any corporation authorized by law to appropriate private property for its use shall have entered upon and appropriated any real or personal property, the owner of the property shall have the right to bring an action against the corporation in the circuit court of the county in which the property is situated for damages for the appropriation at any time before an action at law or in equity for the recovery of the property so taken, or compensation therefor, would be barred by the statute of limitations.

(b) The measure of recovery in the action shall be the same as that governing proceedings by corporations for the condemnation of property.

(c) Proceedings instituted under this section shall be governed by the rules of pleading and practice prescribed for the government of proceedings in the circuit court.

(d) The defendant shall have the right to bring in all parties having or claiming an interest in the property in controversy.

(e) The court shall make the proper orders of the distribution of the compensation recovered in the action among the parties as may be entitled thereto and shall include in the judgment in the proceedings an order condemning the property for the public use to which it may have been appropriated.

History. Acts 1893, No. 149, §§ 1, 2, p. 261; C. & M. Dig., §§ 3930-3932; Pope's Dig., §§ 4931-4933; A.S.A. 1947, §§ 35-101, 35-102.

Cross References. Foreign corpora-

tions have no power to condemn or appropriate private property, Ark. Const., Art. 12, § 11.

Taking of property by corporations, Ark. Const., Art. 12, § 9.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Arkansas Law Survey, Freeman, Property, 8 U. Ark. Little Rock L.J. 197.

CASE NOTES

ANALYSIS

Constitutionality.

Construction.

Applicability.

Damages.

Exclusive Remedy.

Illustrative Cases.

Jurisdiction.

Limitations of Actions.

Constitutionality.

The procedure provided by this section is constitutional because it includes all elements of damage. *Miller Levee Dist. No. 2 v. Wright*, 195 Ark. 295, 111 S.W.2d 469 (1937).

This section and Ark. Const., Art. 2, § 22 fully preserve all the constitutional protections due a property owner for the public taking, injury, or destruction of his property, real or personal. *Collier v. City of Springdale*, 733 F.2d 1311 (8th Cir.), cert. denied, 469 U.S. 857, 105 S. Ct. 186, 83 L. Ed. 2d 120 (1984).

Construction.

The word "owner" as used in this section may be construed to apply to every person having an interest in the property taken, including tenants for life and lessees for years. *Missouri & N. Ark. R.R. v. Chapman*, 150 Ark. 334, 234 S.W. 171 (1921).

Applicability.

This section is applicable to all levee districts. *Young v. Red Fork Levee Dist.*, 124 Ark. 61, 186 S.W. 604 (1916).

Damages.

After possession is taken, the owner is entitled to a trial on the question of damages. *Missouri & N. Ark. R.R. v. Chapman*, 150 Ark. 334, 234 S.W. 171 (1921).

A witness familiar with the character of the lands and improvements thereon, the value of the lands taken, the injury to improvements, etc., was held sufficiently qualified to give an opinion as to damages suffered by owner. *Board of Dirs. v. Permenter*, 192 Ark. 521, 92 S.W.2d 391 (1936).

Just compensation is the sole issue for determination in an eminent domain proceeding. *Edwards v. Arkansas Power & Light Co.*, 683 F.2d 1149 (8th Cir. 1982).

Same measure of damages was used whether the proceeding was an eminent domain action filed by the utility or an inverse condemnation action filed by the landowner; the landowners' remedy for the utility's taking of their property was governed exclusively by the inverse condemnation statute, which permitted them to recover only the value of the portion of the land taken plus any damage to remaining property, it did not permit them to recover the replacement value of their trees. *DeBoer v. Entergy Ark. Inc.*, 82 Ark. App. 400, 109 S.W.3d 142 (2003).

Exclusive Remedy.

The remedy provided in this section is exclusive so long as railroad only appropriates land within limits of the right of

way as defined by statute. *McKennon v. St. Louis, Iron Mountain & S. Ry.*, 69 Ark. 104, 61 S.W. 383 (1901).

Where a corporation appropriates land for its use, without condemnation, the owner's statutory remedy to sue for damages is exclusive and such an action is barred when an action to recover the land would be barred. *Missouri & N. Ark. R.R. v. Chapman*, 150 Ark. 334, 234 S.W. 171 (1921).

Illustrative Cases.

Directed verdict for a utility company was proper under subsection (b) of this section as: (1) the property owners' remedy on an inverse condemnation claim was the value of the portion of the land taken plus any damage to the remaining property; (2) the owners did not submit any evidence as to the damage to the remainder of their property, and (3) opinion evidence of the value of the entire parcel at the time of the taking was not supported by proof that the listing price was reasonable. *Pope v. Overton*, 2011 Ark. 11, 376 S.W.3d 400 (2011).

Jurisdiction.

Consent decree in one county enjoining city's pollution of stream would not preclude a subsequent suit by land owners in another county alleging that pollution of stream amounted to a taking of their land

by city and seeking damages since chancery court in first county had no jurisdiction to awards damages to such owners. *Weathers v. City of Springdale*, 239 Ark. 535, 390 S.W.2d 125 (1965).

Limitations of Actions.

The owner of land taken by a railroad for a right of way has a right to bring suit for damages at any time within the statutory period after the land was taken. *Missouri & N. Ark. R.R. v. Chapman*, 150 Ark. 334, 234 S.W. 171 (1921).

Under provision that the owner of land shall bring his claim against the corporation at any time "before such claim would be barred by the statute of limitations," a public service corporation can acquire an easement by prescription. *Sebastian Lake Devs., Inc. v. United Tel. Co.*, 240 Ark. 76, 398 S.W.2d 208 (1966).

Cited: *Hughes v. Arkansas & Okla. R.R.*, 74 Ark. 194, 85 S.W. 773 (1905); *McLaughlin v. Hope*, 107 Ark. 442, 155 S.W. 910 (1913); *Dickerson v. Tri-County Drainage Dist.*, 138 Ark. 471, 212 S.W. 334 (1919); *Chicago Mill & Lumber Co. v. Board of Dirs.*, 236 Ark. 322, 366 S.W.2d 184 (1963); *Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422 (8th Cir. 1986); *Dixie Furn. Co. v. Arkansas Power & Light Co.*, 19 Ark. App. 160, 718 S.W.2d 120 (1986).

18-15-103. Bill of rights — Property owner.

(a) The principles expressed in subsection (b) of this section shall serve as standards to be followed in any proceeding that involves an entity authorized by law to exercise the power of eminent domain.

(b) An owner of property subject to a proceeding to condemn private property under the right of eminent domain shall have the following bill of rights:

(1) A property owner is entitled to receive just compensation when private property is taken for a public use;

(2) Private property may only be taken for public use;

(3) Private property may only be taken by a governmental entity or a private entity authorized by law to exercise the power of eminent domain;

(4) A property owner has the right to receive reasonable notification of an entity's interest in taking the property owner's private property;

(5)(A) A property owner shall receive from the government or private entity an assessment of the just compensation the entity estimates for the property owner's private property before or contemporaneously with a good faith offer of just compensation.

(B) However, when a property owner cannot be located and must be served by warning order, a filing of the assessment with the complaint for condemnation shall be sufficient compliance with subdivision (b)(5)(A) of this section;

(6) An entity shall make a good faith offer to buy the property owner's private property before initiating a condemnation proceeding;

(7) A property owner has the right to hire an appraiser or other independent professional to determine the value of the private property or to assist the property owner in a condemnation proceeding;

(8) A property owner has the right to hire an attorney to represent the property owner in a condemnation proceeding and negotiate on behalf of the property owner with the entity;

(9) In a proceeding to condemn private property under the right of eminent domain, the circuit court shall impanel a jury of twelve (12) persons as in civil cases to determine the just compensation the government or private entity owes the property owner;

(10) Any party has the right to appeal a decision entered by the circuit court under subdivision (b)(9) of this section; and

(11)(A) Except as provided in subdivision (b)(11)(B) of this section, in a condemnation brought under the laws of this state, a property owner shall be entitled to an award of the property owner's costs, expenses, and reasonable attorney's fees incurred in preparing and conducting the final hearing and adjudication, including without limitation the cost of appraisals and fees for experts if the compensation ultimately awarded exceeds the condemning entity's initial assessment of the just compensation owed by twenty percent (20%) or more.

(B) An award of costs, expenses, and attorney's fees in a condemnation action brought by a county or municipality is governed by the laws that authorize the condemnation action.

History. Acts 2015, No. 1101, § 1.

SUBCHAPTER 2 — COUNTIES AND MUNICIPAL CORPORATIONS GENERALLY

SECTION.

18-15-201. Power to condemn for parks, boulevards, and public buildings — Improvement districts.

SECTION.

18-15-202. Counties — Power to condemn for water and sewer facilities.

Cross References. Eminent domain extended to counties, flood control, § 14-16-112.

School districts, § 6-13-103.

Suburban improvement districts, § 14-92-222.

Effective Dates. Acts 1913, No. 85, § 2: Feb. 21, 1913. Emergency declared.

Acts 1985, No. 991, § 4: Apr. 16, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that under present laws including Act 85 of 1913, as amended, the powers of counties to exercise the power of eminent domain to acquire property for public purposes is severely limited; that the present

limitations on the authority of counties to exercise the power of eminent domain severely restricts the counties' ability to provide essential public services and facilities; that this Act is designed to expand such authority and thereby enable counties to better serve the public and should

be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

Am. Jur. 26 Am. Jur. 2d, Em. Dom., § 23 et seq., § 52 et seq.
C.J.S. 29A C.J.S., Em. Dom., § 25.

U. Ark. Little Rock L.J. Owen, Survey of Arkansas Law Property, 2 U. Ark. Little Rock L.J. 375.

18-15-201. Power to condemn for parks, boulevards, and public buildings — Improvement districts.

(a)(1) The right of eminent domain is granted to municipal corporations and to counties to condemn property for the purpose of parks, boulevards, and public buildings.

(2) In case of municipal corporations, the parks and boulevards may be situated at a distance of not exceeding five (5) miles from the corporate limits and shall remain under the jurisdiction of the municipal corporation.

(b)(1) Improvement districts may be organized under § 14-88-201 et seq. to aid the municipal corporations to acquire the parks and boulevards.

(2)(A) The improvement districts may embrace the whole or any part of the territory of such municipal corporations.

(B) The improvement districts may embrace territory benefited outside of the municipal corporations if a majority in value of the owners of real property in the adjacent territory and a majority in value of the owners of real property in that portion of the district within the municipal corporation shall file with the city or town council a petition thereof in the manner provided by Acts 1889, No. 18, § 2 [repealed].

(c) The proceedings for the condemnation shall be in accordance with §§ 18-15-301 — 18-15-307.

History. Acts 1913, No. 85, § 1; C. & M. Dig., § 4008; Pope's Dig., § 5010; A.S.A. 1947, § 35-901.

CASE NOTES

ANALYSIS

Acceptance of Dedication.

Appeal.

Condemnation Proceedings.

Discontinuance of Action.

Acceptance of Dedication.

Municipal corporation could accept dedication of park within five miles of municipal boundaries. *Mountain View v. Lackey*, 225 Ark. 1, 278 S.W.2d 653 (1955).

Appeal.

In an eminent domain case in which an order of immediate possession was granted, because the issue of just compensation remained to be determined, the order granting immediate possession was not a final, appealable order. The construction of a bicycle trail would not render it impossible to restore his property to its previous condition. *Thomas v. City of Fayetteville*, 2012 Ark. 120 (2012).

Condemnation Proceedings.

A trust was entitled to attorney's fees and costs in connection with the abandon-

ment by a city of condemnation proceedings against property owned by the trust where although the city had no defined purpose for the property, nevertheless continued its pursuit of the property for several years, and abandoned the condemnation proceeding only because a jury determined that the property was worth more than the city wished to pay. *Weaver v. City of Eureka Springs*, 62 Ark. App. 15, 969 S.W.2d 681 (1998).

Discontinuance of Action.

A condemnor has an absolute right to discontinue a condemnation action until actual payment of the compensation. *Vogel v. Crittenden County*, 308 Ark. 250, 822 S.W.2d 382 (1992).

Cited: *Burton v. Ward*, 218 Ark. 253, 236 S.W.2d 65 (1951).

18-15-202. Counties — Power to condemn for water and sewer facilities.

(a)(1) In addition to the purposes for which counties are now authorized to exercise the power of eminent domain, counties are authorized to exercise that power for the purpose of acquiring property for water facilities and sewer facilities.

(2) The counties shall exercise their power of eminent domain only as a last resort, and they shall make use of existing easements and rights-of-way to the extent practicable.

(b) Counties shall exercise the power of eminent domain for the purposes set forth in subsection (a) of this section in accordance with the same procedures and methods by which municipalities are authorized to acquire property by exercising the power of eminent domain for municipal water works purposes, as set forth in §§ 18-15-401 — 18-15-410.

History. Acts 1985, No. 991, §§ 1, 2; A.S.A. 1947, §§ 35-919, 35-920.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Legislative Survey, Property, 8 U. Ark. Little Rock L.J. 599.

SUBCHAPTER 3 — MUNICIPAL CORPORATIONS GENERALLY

SECTION.

18-15-301. Municipal corporations — Power to condemn generally — Definitions.

SECTION.

18-15-302. Municipal corporations — Power to condemn — Compensation for condemna-

SECTION.

- tion — Taking cemetery land.
 18-15-303. Municipal corporations — Power to condemn — Proceedings — Controversy.
 18-15-304. Hearing.
 18-15-305. Payment of assessment — Disputes.

SECTION.

- 18-15-306. Verdict by jury.
 18-15-307. Compensation for and possession of property.
 18-15-308. Amount of award.
 18-15-309. Flood control improvements.

Cross References. Condemnation of land in border cities and towns, § 14-54-106.

Municipal improvement districts generally, § 14-91-104.

Port authorities in cities and towns, § 14-186-210.

Effective Dates. Acts 1875, No. 1, § 95: effective on passage.

Acts 1935, No. 155, § 2: Mar. 20, 1935. Emergency clause provided: "The provisions contained in this act being immediately necessary before municipalities in Arkansas may avail themselves to the fullest extent of loans and grants from the United States of America, and being immediately necessary to permit municipalities in Arkansas to furnish water to their inhabitants of a quantity and quality necessary for the health and safety of said communities, an emergency is hereby declared to exist and this act shall be in force and take effect from and after the date of its passage and approval."

Acts 1953, No. 201, § 2: Mar. 3, 1953. Emergency clause provided: "The General Assembly is cognizant of the fact that the furnishing of water by municipalities to their inhabitants, and for fire protection, is of the utmost importance, therefore, an emergency is declared to exist, and this Act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its passage and approval."

Acts 1955, No. 53, § 3: Feb. 11, 1955. Emergency clause provided: "The General Assembly finds and determines that the

ability of a municipality to furnish an adequate supply of water to its inhabitants and for fire protection is an absolute necessity; that the Act which this Act amends, providing for the exercise of the power of eminent domain to secure such a supply, may not be sufficiently definite to accomplish its intended purpose in all cases, and that by reason of said facts an emergency is declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety, shall take effect and be in force from and after the day of its passage and approval."

Acts 1961, No. 55, § 2: July 1, 1961.

Acts 1988 (4th Ex. Sess.), No. 22, § 4: July 15, 1988. Emergency clause provided: "It is hereby found and determined by the General Assembly that present laws do not clearly authorize and prescribe the procedure whereby cities of the first and second class may exercise the power of eminent domain to acquire property necessary for flood control projects; that it is essential to the proper operations of cities of the first and second class that they be given such authority and that such authority should be granted them at the earliest possible date to enable such cities to protect residents of the city from flooding; that this Act is designed to specifically grant such authority and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Franchise for sports and entertainment: eminent domain as taking for public purpose. 30 A.L.R.4th 1226.

Am. Jur. 26 Am. Jur. 2d, Em. Dom., § 23 et seq., § 52 et seq.

C.J.S. 29A C.J.S., Em. Dom., § 25 and § 27 et seq.

CASE NOTES

Cited: City of Bryant v. Springhill Water & Sewer Servs., Inc., 295 Ark. 336A, 750 S.W.2d 61 (1988).

18-15-301. Municipal corporations — Power to condemn generally — Definitions.

(a) The right and power of eminent domain is conferred upon municipal corporations to enter upon, take, and condemn private property for the construction of wharves, levees, parks, squares, market places, or other lawful purposes.

(b)(1) For waterworks systems, it shall be no objection to the exercise of power that the property to be condemned is located in a different county from the municipal corporation.

(2) In addition, for electric transmission systems and electric distribution systems, it shall be no objection to the exercise of power that the property to be condemned is located outside the corporate limits of the municipal corporation or in a county other than the one wherein the municipal corporation is located.

(3) A municipal corporation shall have the power of eminent domain for its electric transmission system and electric distribution system, outside of its corporate limits without annexation of such territory, regardless of whether the territory has been allocated to an electric public utility or electric cooperative corporation, pursuant to a certificate of convenience and necessity or other authority from the Arkansas Public Service Commission, as long as the electric transmission system or electric distribution system being constructed by the municipal corporation is only for the purpose of serving customers of the municipal corporation and not for the purpose of serving electric public utility customers or electric cooperative customers at retail inside the territory allocated to an electric public utility or electric cooperative corporation pursuant to a certificate of convenience and necessity or other authority from the commission.

(4)(A) Before a municipal corporation exercises the power of eminent domain under this section, the municipal corporation shall provide written notice to any electric public utility or electric cooperative corporation that has received a certificate of convenience and necessity or other authority from the commission to serve retail customers in any area in which the power of eminent domain is to be exercised.

(B)(i) The municipal corporation shall also file a copy of the written notice required under subdivision (b)(4)(A) with the commission.

(ii) The notice shall contain information regarding the facilities to be constructed by the municipal corporation in conjunction with the exercise of eminent domain, including without limitation routing, size, and voltage, in sufficient detail to reasonably allow the electric public utility or electric cooperative corporation to fully evaluate the impact of the facilities on public safety, reliability of the system of the electric public utility or electric distribution cooperative, or future system expansion plans of the electric public utility or electric cooperative corporation.

(C)(i) A municipal corporation shall not exercise the power of eminent domain under this section without obtaining a certificate of convenience and necessity from the commission if the electric public utility or electric cooperative corporation notifies the municipal corporation in writing within forty-five (45) days of its receipt of such notice that the exercise of the power of eminent domain would specifically endanger public safety, negatively impact reliability, or conflict with future construction plans of the electric public utility or electric cooperative corporation.

(ii)(a) The written notice shall be in sufficient detail to reasonably allow the municipal corporation to fully evaluate the problems identified.

(b) In such event, the municipal corporation may seek from the commission, in accordance with law, a certificate of convenience and necessity and exercise the power of eminent domain as may be required by the municipal corporation.

(c)(1) It shall be no objection to the exercise of power that the property to be condemned is a cemetery, if the purpose for which the cemetery is being taken is for an impounding lake for a supply of water or to supplement a supply of water for the waterworks system of the municipality, including land occupied by the cemetery adjacent to the impounding lake taken to prevent pollution of the supply or for an impounding dam to create the impounding lake.

(2) The power of a municipality to condemn a cemetery for those purposes shall extend to all cemeteries except those owned by the United States of America, the State of Arkansas, a county of the State of Arkansas, or a municipality of the State of Arkansas.

(d)(1) In case of water pipelines, electric transmission facilities, or electric distribution facilities, a right-of-way or easement therefor may be condemned, and rights-of-way and easements for the pipelines, electric transmission facilities, or electric distribution facilities may be condemned along and under railroad rights-of-way, if the ordinary use of the railroad rights-of-way are not obstructed thereby.

(2) The water pipelines, electric transmission facilities, or electric distribution facilities may be constructed and maintained across and under lands and waters of the state, but the ordinary use of the lands and waters shall not be unduly obstructed thereby.

(3)(A) The water pipelines, electric transmission facilities, or electric distribution facilities may be constructed and maintained under, across, and along public highways, roads, streets, and alleys, but the ordinary use of the public highways, roads, streets, and alleys shall not be unduly obstructed thereby.

(B) At its own expense, the municipality constructing the water pipelines, electric transmission facilities, or electric distribution facilities shall properly backfill the trench in which the pipeline, electric transmission lines, or electric distribution lines are laid and shall restore any sidewalks, curbs, gutters, pavements, or surfacing cut or damaged by the construction or maintenance.

(e) As used in this section:

(1) "Electric distribution system", "electric distribution facilities", and "electric distribution lines" mean electric utility properties and facilities necessary for distributing electricity below sixty-nine kilovolts (69 kV) phase-to-phase to a municipal corporation's retail customers within its corporate limits or within any other area served by the municipal corporation pursuant to any grant of authority by the commission or any other contiguous municipal corporation pursuant to a franchise agreement or other grant of authority for retail electric service;

(2) "Electric transmission system or systems", "electric transmission facilities", and "electric transmission lines" mean electric utility properties and facilities necessary for transmitting electricity at sixty-nine kilovolts (69 kV) phase-to-phase or higher and not for service to a directly tapped, retail, end-use customer or customers or any wholesale customer or customers except municipal corporations. Any electric utility properties and facilities necessary for transmitting electricity at sixty-nine kilovolts (69 kV) phase-to-phase or higher constructed on lands acquired in whole or in part by the municipal corporation utilizing the power of eminent domain granted in this section may be connected only with the following defined entities for the life of the properties and facilities and no others:

(A) The municipal corporation's electric generation or transmission or distribution system;

(B) Any electric utility or an independent transmission system operator, independent transmission company, independent regional transmission group, or other independent transmission entity operating transmission facilities in this state; and

(C) The electric generation or transmission or distribution system owned by other municipal corporations owning an electric system;

(3) "Municipal corporations" includes consolidated municipal utility improvement districts owning an electric system; and

(4) "Or other lawful purposes" includes a waterworks system, an electric transmission system, or an electric distribution system in its entirety or any integral part thereof or any extension, addition, betterment, or improvement to an existing waterworks system, an electric transmission system, or an electric distribution system owned or operated by a municipal corporation.

History. Acts 1875, No. 1, § 74, p. 1; C. & M. Dig., § 4009; Acts 1935, No. 155, § 1; Pope's Dig., § 5011; Acts 1953, No. 201, § 1; 1955, No. 53, § 1; A.S.A. 1947, § 35-902; Acts 2001, No. 1795, § 1; 2003, No. 366, § 4; 2009, No. 418, § 1; 2011, No. 271, §§ 2, 3.

Amendments. The 2011 amendment

deleted (a)(2); deleted (e)(1) and redesignated (e)(2) as (e)(1); deleted "As used in this subsection" at the beginning of present (e)(1); added present (e)(2); redesignated (f) as (e)(3); deleted "For purposes of this section" at the beginning of present (e)(3); and added (e)(4).

RESEARCH REFERENCES

ALR. Validity of Extraterritorial Condemnation by Municipality. 44 A.L.R.6th 259.

U. Ark. Little Rock L. Rev. Survey of

Legislation, 2001 Arkansas General Assembly, Property Law, 24 U. Ark. Little Rock L. Rev. 549.

CASE NOTES

ANALYSIS

Electric Power.
Industrial Sites.
Waterworks.

Electric Power.

This section does not give a municipal corporation the power of eminent domain outside the city for the purpose of acquiring a right-of-way for electric transmission lines. *City of Osceola v. Whistle*, 241 Ark. 604, 410 S.W.2d 393 (1966).

Industrial Sites.

This section does not give a municipality the power to exercise the right of

eminent domain for the purpose of acquiring industrial sites or parks. *City of Little Rock v. Raines*, 241 Ark. 1071, 411 S.W.2d 486 (1967).

Waterworks.

Construing this section strictly, the legislature intended for cities to have the power to condemn either a waterworks system in its entirety or an integral part of one. *Benton County Water Co. v. Cummings*, 242 Ark. 67, 411 S.W.2d 890 (1967).

Cited: *Jernigan v. Harris*, 187 Ark. 705, 62 S.W.2d 5 (1933); *Ruesing v. City of Conway*, 284 Ark. 530, 683 S.W.2d 922 (1985); *Board of Comm'rs v. Rollins*, 57 Ark. App. 241, 945 S.W.2d 384 (1997).

18-15-302. Municipal corporations — Power to condemn — Compensation for condemnation — Taking cemetery land.

(a) There shall be included in the award of compensation and damages for taking land occupied by a cemetery the reasonable cost of a new site of at least equal size. The new site shall be approved by the State Board of Health and also by the circuit court in which the condemnation proceedings are instituted.

(b)(1) The order and judgment condemning a cemetery shall require the municipality, at its own expense, to remove all bodies, tombstones, and markers from the site of the original cemetery, to reinter the bodies in the new site, and to properly reset the tombstones and markers in the new site.

(2) The court may require the municipality to deposit into the registry of the court a sum found by the court to be sufficient to ensure the performance of the obligation by the municipality.

(3) Nothing contained in this section shall prevent a surviving spouse or next of kin of a person buried in the cemetery from removing the body to another cemetery selected by him or her, the municipality paying the reasonable cost thereof, provided that the cost under this section, if demanded by the next of kin, shall not be less than the amount paid by the municipality for the same service when bodies are removed to a cemetery selected by the municipality.

(c) If any power, oil, gas, or any other public utility facilities shall be flooded by such an impounding lake, the lines may be likewise condemned, and the award of compensation and damages shall include the reasonable cost of relocating the power, oil, gas, or other public utility facility.

(d) If any portion of any county road will be flooded by an impounding lake, the municipality shall pay to the county the cost of relocating that portion of road.

History. Acts 1875, No. 1, § 74, p. 1; 1955, No. 53, § 1; A.S.A. 1947, § 35-902.

CASE NOTES

Temporary Restraining Orders.

Issuance of temporary restraining orders was proper upon allegation of landowners that city was without funds to pay the damages in acquiring right-of-way and order was properly dissolved when the city paid into court, upon its order, an amount far in excess of the appraised

valuation of the damages. *Keith v. Arkansas State Hwy. Comm'n*, 225 Ark. 86, 279 S.W.2d 292 (1955).

Cited: *Jernigan v. Harris*, 187 Ark. 705, 62 S.W.2d 5 (1933); *Ruesing v. City of Conway*, 284 Ark. 530, 683 S.W.2d 922 (1985).

18-15-303. Municipal corporations — Power to condemn — Proceedings — Controversy.

(a)(1) When it shall be deemed necessary by any municipal corporation to enter upon or take private property for a permitted purpose, an application in writing shall be made to the circuit court of the proper county, or the judge thereof in vacation, describing as correctly as may be the property to be taken, the object proposed, and the name of the owner of each lot or parcel thereof.

(2) Notice of the time and place of the application shall be given either personally in the ordinary manner of serving process or by publishing a copy of the application with a statement of the time and place at which it is to be made. Notice shall be published for three (3) weeks preceding the time of the application in some newspaper of general circulation in the county.

(b)(1) When the determination of questions in controversy in the proceedings is likely to retard the progress of construction, the court, or judge in vacation, shall designate an amount of money to be deposited by the municipal corporation, subject to the order of the court and for the purpose of making the compensation and paying damages when the

amount thereof has been assessed. The court or judge shall designate the place of the deposit.

(2) Whenever a deposit has been made in compliance with the order of the court or judge, it shall be lawful for the municipal corporation to enter upon the lands in controversy and proceed with its work of construction prior to the assessment and payment of damages and compensation.

History. Acts 1875, No. 1, § 74, p. 1; C. 201, § 1; 1955, No. 53, § 1; A.S.A. 1947, & M. Dig., § 4009; Acts 1935, No. 155, § 35-902. § 1; Pope's Dig., § 5011; Acts 1953, No.

CASE NOTES

ANALYSIS

Appeal.
Waiver.

Appeal.

A chancellor's order allowing condemnation was not appealable because it was not a final judgment in that it did not determine the right of the landowners to just compensation. *Hyatt v. City of Bentonville*, 275 Ark. 210, 628 S.W.2d 326 (1982).

In an eminent domain case in which an order of immediate possession was granted, because the issue of just compensation remained to be determined, the order granting immediate possession was not a final, appealable order. The construction of a bicycle trail would not render it impossible to restore the landowner's property to its previous condition.

Thomas v. City of Fayetteville, 2012 Ark. 120 (2012).

Waiver.

Where property owners who thought that the lands were about to be condemned, and an interest greater than necessary was about to be taken, failed to file an answer at that time contesting the taking, with a motion to transfer to equity, their right to litigate these questions was waived and they were precluded from raising this issue. *Brixey v. City of Booneville*, 285 Ark. 350, 687 S.W.2d 126 (1985).

Cited: *Jernigan v. Harris*, 187 Ark. 705, 62 S.W.2d 5 (1933); *Ruesing v. City of Conway*, 284 Ark. 530, 683 S.W.2d 922 (1985); *Union Pac. R.R. v. State ex rel. Faulkner County*, 316 Ark. 609, 873 S.W.2d 805 (1994).

18-15-304. Hearing.

(a) If it appears to the court or judge that notice has been served ten (10) days before the time of application, or has been published as provided, and that the notice is reasonably specific and certain, then the court or judge may set a time for the inquiry into and assessment of compensation by a jury before the court or judge.

(b) A jury shall be summoned for the purpose of making inquiry in the same manner that petit jurors are summoned in the circuit court for other purposes. The inquiry and assessment shall be made at the time appointed unless, for good cause, continued to another day to be specified.

(c) If, at the time of the application, it appears that any of the owners of property sought to be condemned are infants or of unsound mind, a guardian ad litem shall be appointed.

(d) The municipal corporation may be required to file a more full and accurate description of the property to be taken and the object proposed

and maps, plats, and surveys if the court or judge deems them necessary or proper.

History. Acts 1875, No. 1, § 74, p. 1; C. & M. Dig., §§ 4010-4012; Pope's Dig., §§ 5012-5014; A.S.A. 1947, § 35-903.

18-15-305. Payment of assessment — Disputes.

(a) The assessment shall be made on each lot or parcel of land separately and distributed to the owner of each tract, according to their true interest and ownership, on the order of the court.

(b)(1) In case of dispute as to interest, title, or ownership, the money allowed therefor shall be held subject to the order of the court until the dispute is amicably settled between the disputants or determined by due course of law.

(2) The inquiry and assessment in all other respects shall be made by the jury under such rules and restrictions as shall be given by the court.

History. Acts 1875, No. 1, § 74, p. 1; C. & M. Dig., §§ 4013, 4014; Pope's Dig., §§ 5015, 5016; A.S.A. 1947, § 35-904.

18-15-306. Verdict by jury.

(a) The jury shall be sworn to make the whole inquiry and assessment but may be allowed to return a verdict, as to part, and be discharged as to the rest, at the discretion of the court.

(b) In case the jury shall be discharged from rendering a judgment in whole or in part, another jury shall be impaneled at the earliest convenient time, who shall take the whole inquiry and assessment, or the part not made, as the case may be.

History. Acts 1875, No. 1, § 74, p. 1; C. & M. Dig., §§ 4015, 4016; Pope's Dig., §§ 5017, 5018; A.S.A. 1947, § 35-905.

18-15-307. Compensation for and possession of property.

(a) As soon as the amount of compensation that may be due to the owners of the property taken, or to any of them, shall have been ascertained by the jury, the court shall make such order as to its payment or deposit as shall be deemed right and proper in respect to the time and place of payment and the proportion to which each owner is entitled and may require adverse claimants of any part of the money or property to interplead, so as to fully settle and determine their rights and interests according to equity and justice.

(b) The court may direct the time and manner in which possession of the property condemned shall be taken or delivered and may, if necessary, enforce any order giving possession.

(c) The costs occasioned by the assessment shall be paid by the corporation, and, as to the other costs which may arise, they shall be charged or taxed as the court may direct.

(d)(1) No delay in making an assessment of compensation or in taking possession shall be occasioned by any doubt which may arise as to ownership of the property, or any part thereof, or as to the interests of the respective owners.

(2) However, in cases in which ownership of the property is doubted, the court shall require a deposit of the money allowed as compensation for the whole property in dispute.

(e) In all cases, as soon as the corporation has paid the compensation assessed or secured the payment by a deposit of money under the order of the court, possession of the property may be taken and the public work or improvement progress.

History. Acts 1875, No. 1, § 75, p. 1; C. & M. Dig., §§ 4017-4019; Pope's Dig., §§ 5019-5021; A.S.A. 1947, § 35-906.

CASE NOTES

ANALYSIS

Attorney's Fees.
Grant of Entry.
Pleadings.

Attorney's Fees.

Trial court clearly erred in finding that when a city was substituted as plaintiff for the highway department, it assumed the department's liabilities for attorney's fees because § 27-67-317 authorizes attorney's fees against the state, not the city; in addition, the order substituting the city for the highway department did not provide that the city assumed the department's liabilities. The city consistently and expressly stated that it was proceeding under the authority granted to municipalities in § 18-15-301 et seq., and this section does not authorize an award of attorney's fees. *City of Siloam Springs v. La-De, LLC*, 2015 Ark. App. 130, 456 S.W.3d 787 (2015), review granted, CV-15-194, 2015 Ark. LEXIS 366 (May 28, 2015).

Grant of Entry.

Where the condemnor by its complaint in a different tribunal was merely seeking immediate access to the condemned land, no determination as to title was requested and bond was deposited in the court registry to protect potential interest in the land, the court properly allowed the entry to condemnor and granted alternative relief. *Karraz v. Taylor*, 259 Ark. 699, 535 S.W.2d 840 (1976).

Pleadings.

Where in condemnation suit a deposit of a sum of money was made into the registry of the court and an order was entered in court stating there was a dispute among defendants as to the ownership of the property, pleadings must be filed by the claimants of the land to assert their claim to ownership so that the court might act thereon. *Bradley v. Keith*, 229 Ark. 326, 315 S.W.2d 13 (1958).

18-15-308. Amount of award.

(a) In the event of the condemnation by a competent authority, for any public use or purpose, of all or substantially all of any land, buildings, or facilities acquired or constructed in whole or in part with the proceeds of revenue bonds issued under the provisions of the Municipalities and Counties Industrial Development Revenue Bond

Law, § 14-164-201 et seq., the condemnation award must be at least sufficient in amount to cover the expenses of the condemnation proceeding and to cover the principal of all of the revenue bonds then outstanding and interest to the next interest payment date thereafter that all the bonds may be called for redemption prior to maturity, together with redemption premiums, if any, paying agent's fees, and all other costs of redemption of the revenue bonds.

(b) For the purposes of this section, the words "all or substantially all" shall be deemed to mean a taking of all of the land, buildings, or facilities or a taking of such a portion thereof that the manufacturing operations being conducted on and in the land, buildings, or facilities cannot, after the taking, be conducted in the remainder in substantially the same manner as before.

History. Acts 1961, No. 55, § 1; A.S.A. 1947, § 35-918.

18-15-309. Flood control improvements.

(a) In addition to the purposes for which municipalities are now authorized to exercise the power of eminent domain, cities of the first class and cities of the second class are authorized to exercise such power for the purpose of acquiring real property or interests in real property necessary for the construction, operation, repair, or maintenance of flood control improvements including, but not limited to, dams, levees, reservoirs, spillways, floodways, and other related improvements.

(b) Cities of the first class and cities of the second class shall exercise the power of eminent domain for the purposes prescribed in subsection (a) of this section in accordance with the procedures and methods prescribed in §§ 18-15-303 — 18-15-307 or in accordance with the procedures and methods prescribed in § 18-15-401 et seq.

History. Acts 1988 (4th Ex. Sess.), No. 22, §§ 1, 2.

CASE NOTES

Levees.

Where the city's proposed levee would not block a natural watercourse, the increased water elevation on the plaintiffs' properties caused by the proposed levee would be de minimis, and where that the city had sufficient funds to compensate the plaintiffs for any damage to their

property and to maintain the levee, construction of the levee was not enjoined. *Scroggin v. City of Grubbs*, 318 Ark. 648, 887 S.W.2d 283 (1994).

Cited: *Lois Marie Combs Revocable Trust v. City of Russellville*, 2011 Ark. 186 (2011).

SUBCHAPTER 4 — MUNICIPAL CORPORATIONS — WATERWORKS SYSTEMS

SECTION.

- 18-15-401. Right to acquire property.
- 18-15-402. Authority to enter property — Liability.

SECTION.

- 18-15-403. Preliminary proceedings for condemnation.
- 18-15-404. Assessment and payment of

SECTION.

- damages.
 18-15-405. Power, oil, and gas lines, etc.
 18-15-406. Water pipelines and appurtenances.
 18-15-407. State or county roads.

SECTION.

- 18-15-408. Cemeteries and graves.
 18-15-409. Controversy.
 18-15-410. Rights of property owner upon entry by municipality.

Publisher's Notes. Acts 1957, No. 269, § 12, provided that this subchapter would apply to all actions then pending as well as to future actions if the requirements of this subchapter are met.

Effective Dates. Acts 1957, No. 269, § 15: Mar. 14, 1957. Emergency clause provided: "The General Assembly hereby finds, declares and determines that existing laws of eminent domain do not furnish sufficient authority for condemnation of lands for municipal waterworks systems; that the furnishing of an adequate supply of water to its inhabitants by a municipality is an absolute necessity; that there is

municipal waterworks construction underway in this State at the present time which requires immediately the additional authority granted by this Act, without which construction of waterworks facilities will be seriously hampered and delayed to the detriment of the citizens of this State and to the detriment of the public health and general welfare, and that by reason of said facts an emergency is declared to exist and this Act, being necessary for the immediate preservation of the public peace, health, safety and welfare, shall take effect from and after its passage and approval."

RESEARCH REFERENCES

Am. Jur. 26 Am. Jur. 2d, Em. Dom., § 66.
C.J.S. 29A C.J.S., Em. Dom., § 35.

U. Ark. Little Rock L.J. Owen, Survey of Arkansas Law: Property, 2 U. Ark. Little Rock L.J. 275.

18-15-401. Right to acquire property.

(a) A municipality operating a waterworks system under the provisions of this subchapter shall have the right to acquire any property useful for municipal waterworks purposes by following the eminent domain proceedings set forth in this subchapter.

(b) A municipality's right of eminent domain shall be exercised by the operating authority of the municipal waterworks system.

(c) This subchapter shall be cumulative to any other laws of eminent domain in favor of municipalities operating municipal waterworks systems.

History. Acts 1957, No. 269, §§ 2, 14; A.S.A. 1947, §§ 35-908, 35-908n.

CASE NOTES

Cited: City of Little Rock v. Sawyer, 228 Ark. 516, 309 S.W.2d 30 (1958); Benton County Water Co. v. Cummings, 242 Ark. 67, 411 S.W.2d 890 (1967); Board of

Comm'rs v. Rollins, 57 Ark. App. 241, 945 S.W.2d 384 (1997); Lois Marie Combs Revocable Trust v. City of Russellville, 2011 Ark. 186 (2011).

18-15-402. Authority to enter property — Liability.

For the purpose of making investigations, surveys, tests, and measurements, a municipality is authorized to enter upon any property by its agents, employees, or contractors. However, the municipality shall be liable for any damages to the owner's property resulting from its acts.

History. Acts 1957, No. 269, § 3; A.S.A. 1947, § 35-909.

18-15-403. Preliminary proceedings for condemnation.

(a)(1) When the operating authority determines to condemn property, it shall file an application in the circuit court of the county where any portion of the property to be condemned is situated, and proceedings had in the court shall apply to all property described in the application.

(2) The applicant shall describe the property to be taken and shall name as defendants all persons shown by public records as having any interest therein.

(3) Both residents and nonresidents of the state shall be summoned as in other civil proceedings.

(4)(A) However, if a verified affidavit is filed in behalf of the applicant stating that all or a number of the persons who might be claiming an interest in the property are unknown to the applicant, then unknown owners may be named as defendants.

(B) If the affidavit is filed or if a verified affidavit is filed in behalf of the applicant stating that the address of any known defendant cannot be determined after diligent inquiry by the applicant, then any defendant described in either affidavit shall be summoned by publication of notice as in the case of nonresident defendants in other civil actions, except that an attorney ad litem shall not be appointed for any defendant whose name or whose address is unknown.

(b) Answers may be filed, but none shall be required of any defendant.

(c)(1) The matter may proceed to trial after the lapse of twenty (20) days from the date of personal service of summons on residents and after the lapse of thirty (30) days from the date of first publication of notice on defendants constructively summoned.

(2) The suits shall receive precedence over other matters and shall be advanced for trial at the request of the applicant.

(3) The trial date shall be fixed by the court, and when fixed, the applicant shall give notice of the trial date by registered or certified mail to any defendant who was personally summoned. No notice of trial is required for any defendant whose address is unknown.

History. Acts 1957, No. 269, § 4; A.S.A. 1947, § 35-910.

18-15-404. Assessment and payment of damages.

(a) At the trial of the cause, a jury shall assess the amount of damages the applicant shall pay for the property taken in the proceedings.

(b) Thereafter, a judgment shall be entered stating that title to the property shall vest in the applicant upon payment to the clerk of the court of the amount of damages so assessed.

(c)(1) If there is only one (1) defendant, the clerk of the court shall pay the proceeds of the judgment to the defendant upon demand.

(2) If there is more than one (1) defendant, the lower court shall retain jurisdiction of the matter solely for the purpose of making a division of the proceeds and shall determine the division sitting without a jury and without further notice to any defendant.

(3) The court shall then enter an order making a division of the proceeds and shall direct the clerk of the court to make payment to the various defendants in the amounts which shall be specified in the order. The payment shall be made by the clerk to each defendant upon his or her demand.

(4) The applicant shall not be a party to proceedings for the division of the damages.

History. Acts 1957, No. 269, § 5; A.S.A. 1947, § 35-911.

CASE NOTES**Dismissal of Condemnation Proceedings.**

Where there had been no "reciprocal" or other vesting of title at the time the city sought to dismiss its condemnation proceeding, the dismissal of the city's condemnation claim should have been al-

lowed, but the court should have retained jurisdiction of the matter to consider damages to compensate the utility for the temporary deprivation of their property. *City of Bryant v. Springhill Water & Sewer Servs., Inc.*, 295 Ark. 336A, 750 S.W.2d 61 (1988).

18-15-405. Power, oil, and gas lines, etc.

If any power, oil, or gas line or other public utility facility shall be flooded by an impounding lake, the property may be condemned if the operating authority of the municipal waterworks system determines the existence of the facility is inconsistent with the waterworks' requirements.

History. Acts 1957, No. 269, § 6; A.S.A. 1947, § 35-912.

18-15-406. Water pipelines and appurtenances.

Water pipelines, with appurtenances, may be constructed and maintained:

(1) Across and under lands and waters of the state, but the ordinary use of the lands and waters shall not be unduly obstructed thereby; and

(2)(A) Under, across, and along public highways, roads, streets, and alleys.

(B) However, the ordinary use of these public highways, roads, streets, and alleys shall not be unduly obstructed thereby, and the municipality constructing the water pipelines shall at its own expense properly backfill the trench in which the pipeline is laid and shall at its own expense restore any sidewalks, curbs, gutters, pavements, or surfacing cut or damaged by the construction or maintenance.

History. Acts 1957, No. 269, § 7; A.S.A. 1947, § 35-913.

18-15-407. State or county roads.

(a) If any portion of a state or county road will lie below the high-water mark of an impounding lake, the operating authority of the municipal waterworks system shall have the right to flood the road.

(b) However, if the state or the county determines that a replacement road is required, the municipality shall be obligated to pay the cost of replacing the flooded road with another road of the same type and width. The road shall be the shortest reasonable distance consistent with good engineering practice.

(c)(1) The Arkansas State Highway and Transportation Department, hereinafter called "state", shall make all necessary determinations for the state highways.

(2) The county judges, hereinafter called "county", shall make all determinations for county roads.

(d) If the county or state determines that a road need not be replaced, the operating authority is authorized to pay to the county or to the state a reasonable sum in lieu of relocating the road. Any sum so paid shall be used by the state or county for road purposes elsewhere in the state or county, as the case may be.

(e) The county or state may permit the municipality to construct the relocated road, and in that event the operating authority shall be entitled to condemn rights-of-way for the roads in its own name under this subchapter or under any eminent domain act available to the county or state.

(f) After acquiring the rights-of-way, title thereto shall be transferred to the county or state.

(g) If any part of the road replaced or paid for as authorized in this section lies upon property owned by the municipality, title to that part of the replaced road shall vest in the municipality.

History. Acts 1957, No. 269, § 8; A.S.A. 1947, § 35-914.

18-15-408. Cemeteries and graves.

(a)(1) An operating authority of a municipal waterworks system shall file a notice of intent to condemn in the circuit court of the county where a cemetery or graves are situated if the operating authority determines that:

(A) Land occupied by the cemetery or by the graves will be flooded by an impounding lake;

(B) The water level of the lake will affect the graves underground;

(C) The lake may be contaminated by the graves; or

(D) The lands will be useful for waterworks purposes.

(2) The notice of intent to condemn shall set out the:

(A) Commonly known name of the cemetery, if any;

(B) Descriptions of the quarter sections of land upon which the cemetery or graves are situated;

(C) Description of a proposed new location of the cemetery or graves; and

(D) Name of the owner of the existing cemetery, if known.

(3) The notice shall take the place of the application to condemn which would be otherwise required under this subchapter.

(4) Service of process upon the owner, if known, shall be as specified in this subchapter. Service upon all other interested parties shall be as follows:

(A) The notice shall be published one (1) time a week for four (4) consecutive weeks in some newspaper having a general circulation throughout the state in order to give the widest publicity to the municipality's intention;

(B) In addition, a printed copy of the notice shall be posted in three (3) conspicuous public places in the cemetery or immediately surrounding the graves;

(C) The notice shall be posted within three (3) days of filing the notice with the court; and

(D) The municipality shall, by affidavit filed with the court, give proof of posting of the notice.

(5)(A) Before filing the notice with the court, the municipality shall be required to select a tract of land at least equal in size to the cemetery to be condemned and shall describe the tract in the notice.

(B) The municipality shall be required to file with its notice a statement from the Department of Health approving the proposed new location.

(6) After the notice of intent has been published for four (4) weeks, as required by this section, the circuit court sitting without a jury shall determine if the proposed new location is suitable, and, if the court so finds, it shall enter an order to that effect. The owner of the cemetery or of the lands where the existing cemetery is located and the next of kin of any person buried in the cemetery or in the graves shall be entitled to appear in the proceeding and object to the proposed location and suggest other locations.

(b)(1) Thereafter, the municipality may file an application under the provisions of this subchapter for condemnation of the site so approved by the court, within a radius of four (4) miles of the existing cemetery.

(2) It is declared that the acquisition of the site shall be for public purposes and that the site may be condemned by the operating authority of a municipal waterworks system.

(c)(1) After judgment has been entered vesting title to the new site in the applicant, as set out in § 18-15-404, the court shall enter an order in the proceedings mentioned in subsection (a) of this section, vesting title to the new cemetery site in the persons owning the lands of the cemetery or graves to be relocated and vesting title in the municipality to the lands where the old cemetery or graves are located.

(2) The order vesting title to the new cemetery site in the owners of the old cemetery or grave sites shall be the compensation and damages to which the owners of the old sites are entitled.

(d)(1) Thereafter, the municipality, at its own expense, shall be required to remove all bodies, tombstones, and markers from the site of the original graves and to reinter the bodies in the new site, properly resetting tombstones and markers, if any, at the new site.

(2) The court may require the municipality to deposit with the clerk of the court a sum found by the court to be sufficient to ensure the performance of the obligation by the municipality.

(3) However, any surviving spouse or next of kin of a person whose grave is to be relocated may demand, prior to removal from the old grave site, that the municipality pay the expense of removing the body of the decedent to a cemetery selected by the surviving spouse or next of kin, the municipality paying the reasonable cost of the removal and reinterment.

(e) If the old cemetery site was fenced, the municipality shall be required to install a fence of similar type around the new cemetery site and shall be required to construct within the cemetery such hard-surfaced roads as may be necessary to give access to grave sites. The roads shall be of at least equal quality with the roads in the original cemetery site.

History. Acts 1957, No. 269, § 9; A.S.A. 1947, § 35-915.

18-15-409. Controversy.

(a)(1) When the determination of questions in controversy in the eminent domain proceedings authorized in this subchapter is, in the opinion of the operating authority of the municipal waterworks, likely to retard the progress of the project, the municipality shall so state in its application or in a separate pleading.

(2) The municipality shall also designate a sum which, in its opinion, is the reasonable value of the property to be taken and shall deposit that sum in the registry of the court for the purpose of making

compensation and paying any damages which may be assessed against the municipality.

(3) The court shall thereupon immediately enter an order giving the municipality possession of the property and may enforce the order, if necessary.

(4) A copy of the order of possession shall be served upon any person of adult age found residing upon the premises, but only one (1) person need be served.

(5) However, at any time after the order is entered, any defendant may file a motion for a hearing on the amount of the deposit, giving notice of the motion to the applicant, and at the hearing the court may affirm the amount of the original deposit or may order it increased.

(6) No motion for hearing shall delay the applicant's right to possession.

(b)(1) Any person named as a defendant in the action and claiming to be an owner of the property being condemned shall be entitled to apply to the court for a withdrawal of all or a part of the funds so deposited upon giving reasonable notice of his or her motion to withdraw funds to the applicant. The defendant shall also notify all other defendants whose addresses are known of his motion.

(2)(A) Before entering an order permitting a withdrawal of any portion of the deposit, the court shall determine the ownership of the property to be condemned, and no defendant shall be permitted to withdraw any greater portion of the deposit than is equal to his or her interest in the property to be condemned.

(B) In no event shall the aggregate amount of the withdrawal for all defendants be greater than the amount originally deposited by the municipality on its own motion.

(3) If any defendant claims that the amount withdrawn by any other defendant was wrongful or was excessive, the dispute shall be solely between the defendants.

(4) In any judgment against the municipality, the municipality shall receive full credit against all defendants for the amount deposited with the clerk or paid to the clerk after judgment.

History. Acts 1957, No. 269, § 10;
A.S.A. 1947, § 35-916.

CASE NOTES

Notice.

Where the condemning authorities did not notify the property owners that the check for the estimated value of the property had been tendered to and accepted by the court, the property owners were en-

titled to interest. Board of Comm'rs v. Rollins, 57 Ark. App. 241, 945 S.W.2d 384 (1997).

Cited: City of Fort Smith v. Carter, 372 Ark. 93, 270 S.W.3d 822 (2008).

18-15-410. Rights of property owner upon entry by municipality.

(a) If a municipality shall enter upon property which it has the right to acquire by condemnation proceedings without commencing condemnation proceedings, the owner of the property shall have the right to commence condemnation proceedings against the municipality at any time before an action for the recovery of the property or compensation therefor would be barred by the statute of limitations.

(b) The measure of recovery in the action shall be the fair market value of the property at the time it was entered upon by the municipality.

History. Acts 1957, No. 269, § 11; A.S.A. 1947, § 35-917.

CASE NOTES

ANALYSIS

Federal Action.
Statute of Limitations.

Federal Action.

Subdivision developers' 42 U.S.C. § 1983 action against the city for taking their privacy buffer without just compensation was not ripe for prosecution where they had not pursued compensation under this section. *McKenzie v. City of White Hall*, 112 F.3d 313 (8th Cir. 1997).

Statute of Limitations.

Owners of land used by a city as a dump did not have a viable cause of action against the city for inverse condemnation because the seven-year statute of limitations under § 18-61-101 had expired, the city's use of the land as a dump since the 1950s showed an intent to possess adversely, and no action had been filed previously. *Daniel v. City of Ashdown*, 94 Ark. App. 446, 232 S.W.3d 511 (2006).

SUBCHAPTER 5 — ELECTRIC COMPANIES GENERALLY

SECTION.

- 18-15-501. Right-of-way construed.
- 18-15-502. Exception.
- 18-15-503. Powers.
- 18-15-504. Petition for assessment of damages.
- 18-15-505. Appointment of guardian ad litem.
- 18-15-506. Trial by jury.
- 18-15-507. Damages.

SECTION.

- 18-15-508. Deposit in case of controversy.
- 18-15-509. Destruction or injury to company property.
- 18-15-510. Construction of hydroelectric dams — Rights-of-way for railroad in connection with use or construction of dam.
- 18-15-511. Declaration of public interest.
- 18-15-512. Definition of "electric utility".

Cross References. Eminent domain for transmission lines, treble compensation, § 23-18-108.

Effective Dates. Acts 1907, No. 120, § 17: effective on passage.

Acts 1929, No. 246, § 2: approved Mar. 27, 1929. Emergency clause provided:

"Immediate construction of hydro-electric dams in the State of Arkansas being necessary for the preservation of the public peace, health and safety, an emergency is declared to exist and this act shall be in force and effect immediately after its passage."

RESEARCH REFERENCES

ALR. Review of electric power company's location of transmission line for which condemnation is sought. 19 A.L.R.4th 1026.

Am. Jur. 26 Am. Jur. 2d, Em. Dom., §§ 28, 144, 306 et seq.

C.J.S. 29A C.J.S., Em. Dom., § 45.

U. Ark. Little Rock L.J. Owen, Survey of Arkansas Law: Property, 2 U. Ark. Little Rock L.J. 275.

DeSimone, Survey of Property Law, 3 U. Ark. Little Rock L.J. 286.

18-15-501. Right-of-way construed.

The right-of-way provided for under this section and §§ 18-15-502 — 18-15-509 shall be construed to include all lands necessary for dams and the backwater resulting therefrom, levees, approaches, abutments, canals, reservoirs, powerhouses, and other purposes incident to the business of generating, transmitting, distributing, or supplying electricity to or for the public for compensation or for public use by an electric utility, as defined in § 18-15-512.

History. Acts 1907, No. 120, § 16, p. 303; C. & M. Dig., § 4057; Pope's Dig., § 5059; A.S.A. 1947, § 35-316; Acts 2001, No. 1291, § 1; 2013, No. 1130, § 1.

Amendments. The 2013 amendment made no change to this section.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2001 Arkansas General As-

sembly, Property Law, 24 U. Ark. Little Rock L. Rev. 549.

18-15-502. Exception.

No action to condemn the right-of-way over, upon, or along any street or alley in any city or incorporated town shall be instituted or maintained by an electric utility as against any city or incorporated town.

History. Acts 1907, No. 120, § 5, p. 303; C. & M. Dig., § 4047; Pope's Dig., § 5049; A.S.A. 1947, § 35-305; Acts 2001, No. 1291, § 2; 2013, No. 1130, § 2.

Amendments. The 2013 amendment made no change in this section.

CASE NOTES

Cited: Loyd v. Southwest Ark. Utils. Corp., 264 Ark. 818, 580 S.W.2d 935 (1979).

18-15-503. Powers.

(a)(1)(A) An electric utility organized or domesticated under the laws of this state for the purpose of generating, transmitting, distributing, or supplying electricity to or for the public for compensation or for public use may construct, operate, and maintain such lines of wire,

cables, poles, or other structures necessary for the transmission or distribution of electricity and broadband services:

(i) Along and over the public highways and the streets of the cities and towns of the state;

(ii) Across or under the waters of the state;

(iii) Over any lands or public works belonging to the state;

(iv) On and over the lands of private individuals or other persons;

(v) Upon, along, and parallel to any railroad or turnpike of the state; and

(vi) On and over the bridges, trestles, and structures of railroads.

(B) In constructing such dams as the electric utility may be authorized to construct for the purpose of generating electricity by water power, the electric utility may flow the lands above the dams with backwater resulting from construction.

(2)(A) However, the ordinary use of the public highways, streets, works, railroads, bridges, trestles, or structures and turnpikes shall not be obstructed, nor the navigation of the waters impeded, and just damages shall be paid to the owners of such lands, railroads, and turnpikes.

(B) The permission of the proper municipal authorities shall be obtained for the use of the streets.

(b)(1) In the event that an electric utility, upon application to the individual, railroad, turnpike company, or other persons, should fail to secure by consent, contract, or agreement, a right-of-way for the purposes enumerated in subsection (a) of this section, then the electric utility shall have the right to proceed to procure the condemnation of the property, lands, rights, privileges, and easements in the manner prescribed in this subchapter.

(2) However, an electric utility shall not be required to secure by consent, contract, or agreement or to procure by condemnation the right to provide broadband services over its own lines of wire, cables, poles, or other structures that are in service at the time that the electric utility provides broadband services over the lines of wire, cables, poles, or other structures.

(c) Whenever an electric utility desires to construct its line on or along the lands of individuals or other persons or on the right-of-way and the structures of any railroad or upon and along any turnpike, the electric utility, by its agent, shall have the right to enter peacefully upon the lands, structures, or right-of-way and survey, locate, and lay out its line thereon, being liable, however, for any damage that may result by reason of the acts.

History. Acts 1907, No. 120, §§ 1-3, p. 303; C. & M. Dig., §§ 4043-4045; Pope's Dig., §§ 5045-5047; A.S.A. 1947, §§ 35-301 — 35-303; Acts 2001, No. 1291, § 3; 2007, No. 739, § 3; 2013, No. 1130, § 3.

Amendments. The 2013 amendment, in (b)(2), substituted "an" for "no" and inserted "not".

CASE NOTES

ANALYSIS

Foreign Corporations.
Right-of-Way.
Streets and Highways.

Foreign Corporations.

This section does not confer right of eminent domain on foreign corporations. *Southwestern Gas & Elec. Co. v. Patterson Orchard Co.*, 180 Ark. 148, 20 S.W.2d 636 (1929).

Right-of-Way.

A right-of-way must be surveyed and located, that is, defined. *Loyd v. Southwest Ark. Utils. Corp.*, 264 Ark. 818, 580 S.W.2d 935 (1979).

The only right of access granted by this section is the right to acquire a right-of-way or reasonable access. *Loyd v. Southwest Ark. Utils. Corp.*, 264 Ark. 818, 580 S.W.2d 935 (1979).

Where the public utility had ample access to its right-of-way without the necessity of crossing the lands of the landowner since there were numerous existing public roads on the landowner's lands which crossed the right-of-way, it had to specifically describe, condemn, and pay just compensation for any alternate routes of reasonable access. *Arkansas Power & Light Co. v. Potlatch Forest, Inc.*, 288 Ark. 525, 707 S.W.2d 317 (1986).

Where the public utility sought the right to cut, trim, or remove "danger trees" growing outside of its right-of-way that could potentially endanger its transmission line, and the landowner would be deprived of its customary use and practice of tree farming of the property on which the "danger trees" would be cut since it would be unable to grow trees in the area outside the right-of-way, the public utility had to specifically describe, condemn, and pay just compensation for the right to cut, trim, or remove trees that could potentially endanger the transmission line. *Arkansas Power & Light Co. v. Potlatch Forest, Inc.*, 288 Ark. 525, 707 S.W.2d 317 (1986).

The question of whether the condemnation of a right-of-way for a transmission line is necessary must be left largely to the discretion of the condemnor, and the exercise of that discretion will not be disturbed

unless it clearly appears that the discretion has been abused and the action is arbitrary and causing unnecessary damage to the property owners. *Harness v. Arkansas Pub. Serv. Comm'n*, 60 Ark. App. 265, 962 S.W.2d 374 (1998).

Commission's decision to grant a certificate to construct a 69-kilovolt electric transmission line affirmed; notice to affected landowners held sufficient under § 23-3-201. *Harness v. Arkansas Pub. Serv. Comm'n*, 60 Ark. App. 265, 962 S.W.2d 374 (1998).

Streets and Highways.

An electric power company's right to use for its line a highway running through a village subsequently incorporated was merely that a competitor's occupancy should not be allowed to interfere with its physical property. *Arkansas Power & Light Co. v. West Memphis Power & Water Co.*, 184 Ark. 206, 41 S.W.2d 755 (1931), cert. denied, 285 U.S. 536, 52 S. Ct. 310, 76 L. Ed. 930 (1932).

Electric company erecting poles and wires on land was a trespasser and liable for nominal damages even though no actual damages were shown, and highway department had a right-of-way over the land. *Cathey v. Arkansas Power & Light Co.*, 193 Ark. 92, 97 S.W.2d 624 (1936).

Where power company placed its poles along city streets and paid fee for the privilege, the company acquired a property right which could not be taken by the Arkansas State Highway Commission without compensation. *Arkansas State Hwy. Comm'n v. Arkansas Power & Light Co.*, 235 Ark. 277, 359 S.W.2d 441 (1962).

Cited: *Arkansas Power & Light Co. v. Lum*, 222 Ark. 678, 262 S.W.2d 920 (1953); *Arkansas State Highway Com. v. Arkansas Power & Light Co.*, 231 Ark. 307, 330 S.W.2d 77 (1959); *Black v. Arkansas Power & Light Co.*, 236 Ark. 447, 366 S.W.2d 899 (1963); *McCastlain v. Oklahoma Gas & Elec. Co.*, 243 Ark. 506, 420 S.W.2d 893 (1967); *City of Little Rock v. Linn*, 245 Ark. 260, 432 S.W.2d 455 (1968); *Edwards v. Arkansas Power & Light Co.*, 519 F. Supp. 484 (E.D. Ark. 1981); *Edwards v. Arkansas Power & Light Co.*, 683 F.2d 1149 (8th Cir. 1982); *Columbia County Rural Dev. Auth. v. Hudgens*, 283 Ark. 415, 678 S.W.2d 324 (1984); *Craig-*

head Elec. Coop. Corp. v. Craighead County, 352 Ark. 76, 98 S.W.3d 414 (2003).

18-15-504. Petition for assessment of damages.

(a) If an electric utility, having surveyed and located its line under the power conferred by this section, §§ 18-15-501 — 18-15-503, and §§ 18-15-505 — 18-15-509, fails to obtain, by agreement with the owner of the property through which the line may be located, the right-of-way over the property, it may apply by petition to the circuit court of the county in which the property is situated to have the damages for the right-of-way assessed, giving the owner of the property at least ten (10) days' notice in writing by certified mail, return receipt requested, of the time and place where the petition will be heard.

(b) In case property sought to be condemned is owned by any individual or corporation and is located in more than one (1) county, the petition may be filed in the circuit court of any county in which the whole or a part of the property may be located, and proceedings had therein will apply to all property designated in the petition.

(c) If the owners of the property are nonresidents of the state, infants, or persons of unsound mind, the notice shall be given as follows:

(1)(A) By publication in any newspaper in the county which is authorized by law to publish legal notices.

(B) The notices shall be published for the same length of time as may be required in other civil causes;

(2) If there is no such newspaper published in the county, then the publication shall be made in some newspaper designated by the circuit clerk and one (1) written or printed notice thereof posted on the door of the courthouse of the county; and

(3) In writing by certified mail, return receipt requested, to the address of the owners of the property as it appears on the records in the office of the county sheriff or county tax assessor for the mailing of statements of taxes, as provided in § 26-35-705.

(d) As nearly as may be, the petition shall describe the lands over which the right-of-way is located and for which damages are asked to be assessed, whether improved or unimproved, and be sworn to.

(e)(1) An electric utility shall not be required to petition a court in order to provide broadband services over its own lines of wire, cables, poles, or other structures that are in service at the time that the electric utility provides broadband services over the lines of wire, cables, poles, or other structures.

(2) An owner of property upon which an electric utility's lines of wire, cables, poles, or other structures are located may petition the circuit court of the county in which the property is situated for any compensation to which it might be entitled under this subchapter.

History. Acts 1907, No. 120, §§ 5-7, 9, Pope's Dig., §§ 5049-5051, 5053; A.S.A. p. 303; C. & M. Dig., §§ 4047-4049, 4051; 1947, §§ 35-305 — 35-307, 35-309; Acts

1999, No. 1236, § 1; 2001, No. 1291, § 4; 2007, No. 739, § 4; 2013, No. 1130, § 4.

Amendments. The 2013 amendment changed “any” to “and” in (a); inserted “is

owned by any individual or corporation and” in (b); and in (e)(1), substituted “An” for “No” and inserted “not”.

18-15-505. Appointment of guardian ad litem.

In case of infants or persons of unsound mind, when no legal representative or guardian appears in their behalf at the hearing, it shall be the duty of the court to appoint a guardian ad litem who shall represent their interests for all purposes.

History. Acts 1907, No. 120, § 8, p. 303; C. & M. Dig., § 4050; Pope’s Dig., § 5052; A.S.A. 1947, § 35-308.

18-15-506. Trial by jury.

It shall be the duty of the court to impanel a jury of twelve (12) persons, as in other civil cases, to ascertain the amount of compensation which the electric utility shall pay, and the matter shall proceed and be determined as other civil causes.

History. Acts 1907, No. 120, § 10, p. 303; C. & M. Dig., § 4052; Pope’s Dig., § 5054; A.S.A. 1947, § 35-310; Acts 2001, No. 1291, § 5; 2013, No. 1130, § 5.

Amendments. The 2013 amendment made no change in this section.

CASE NOTES

ANALYSIS

Evidence.

Value of Property.

Evidence.

Unrecorded plat admissible to demonstrate diminished value of land. *Arkansas Power & Light Co. v. Childers*, 253 Ark. 894, 489 S.W.2d 776 (1973).

It was error to permit witness to state the sales prices of other land in the vicinity without explaining the similarity and comparability, if any, of the lands sold to the property condemned. *Arkansas Power & Light Co. v. Childers*, 253 Ark. 894, 489 S.W.2d 776 (1973).

Value of Property.

The test for the value of condemned property was not the value of the land to the power company but the loss caused to the property owner by virtue of the condemnation. Therefore, it was error to instruct jury that if the property were well adapted for the use to which it was being taken and the necessity for that use so imminent as to add something to its value in the minds of the power company, that element could be considered in estimating market value. *Arkansas Power & Light Co. v. Childers*, 253 Ark. 894, 489 S.W.2d 776 (1973).

18-15-507. Damages.

(a)(1) The amount of damages to be paid the owner of the lands for the right-of-way for the use of the electric utility shall be determined and assessed irrespective of any other benefit that the owner may receive from any improvement proposed by the electric utility.

(2)(A) If an owner of property petitions a court under § 18-15-504(e), the amount of damages, if any, payable to the owner for the use of preexisting lines of wire, cables, poles, or other structures by an electric utility to provide broadband services shall be limited to an amount sufficient to compensate the property owner for the increased interference, if any, with the owner's use of the property caused by any new or additional physical attachments to the preexisting facility for the purpose of providing broadband services.

(B) Evidence of revenues or profits derived by an electric utility from providing broadband services is not admissible for any purpose in a proceeding under § 18-15-504(e).

(b) In all cases in which damages for the right-of-way for the use of the electric utility shall have been assessed in the manner provided, it shall be the duty of the electric utility to deposit with the court or pay to the owners the amount so assessed and pay such costs as may be in the discretion of the court be adjudged against it within thirty (30) days after the assessment. Whereupon, it shall and may be lawful for the electric utility to enter upon, use, and have the right-of-way over the lands forever.

(c) In all cases in which the electric utility shall not pay or deposit the amount of damages assessed pursuant to this section, §§ 18-15-501 — 18-15-506, § 18-15-508, and § 18-15-509 within thirty (30) days after the assessment, the electric utility shall forfeit all rights in the premises.

History. Acts 1907, No. 120, §§ 11, 12, 15, p. 303; C. & M. Dig., §§ 4052, 4053, 4056; Pope's Dig., §§ 5054, 5055, 5058; A.S.A. 1947, §§ 35-311, 35-312, 35-315; Acts 2001, No. 1291, § 6; 2007, No. 739, § 5; 2013, No. 1130, § 6.

Amendments. The 2013 amendment deleted “§” following “15-15-506” and “18-15-508” in (c).

18-15-508. Deposit in case of controversy.

(a) When the determination of questions in controversy in the proceedings is likely to retard the progress of work on or the business of the electric utility, the court or judge in vacation shall designate an amount of money to be deposited by the electric utility, subject to the order of the court, and for the purpose of making compensation when the amount thereof has been assessed, as provided in § 18-15-507, and the judge shall designate the place of deposit.

(b) Whenever the deposit has been made in compliance with the order of the court or judge, it shall be lawful for the electric utility to enter upon the land and proceed with its work, through and over the lands in controversy, prior to the assessment and payment of damages for the use and right to be determined as provided in this section, §§ 18-15-501 — 18-15-507, and § 18-15-509.

History. Acts 1907, No. 120, §§ 13, 14, p. 303; C. & M. Dig., §§ 4054, 4055; Pope's Dig., §§ 5056, 5057; A.S.A. 1947, §§ 35-313, 35-314; Acts 2001, No. 1291, § 7; 2013, No. 1130, § 7.

Amendments. The 2013 amendment deleted "§" following "18-15-507, and" in (b).

CASE NOTES

Cited: *Edwards v. Arkansas Power & Light Co.*, 519 F. Supp. 484 (E.D. Ark. 1981).

18-15-509. Destruction or injury to company property.

A person who destroys or injures the wire, cable, pole, dam, reservoir, canal, power house, machinery, or appliances therein of the electric utility is guilty of a misdemeanor and upon conviction shall be fined in any sum not less than fifty dollars (\$50.00) nor more than one thousand dollars (\$1,000) and imprisoned in the county jail for a period of not less than ten (10) days nor more than six (6) months.

History. Acts 1907, No. 120, § 4, p. 303; C. & M. Dig., § 4046; Pope's Dig., § 5048; A.S.A. 1947, § 35-304; Acts 2001, No. 1291, § 8; 2013, No. 1130, § 8.

Amendments. The 2013 amendment, substituted "destroys or injures" for "shall destroy or injure" and "is" for "shall be".

18-15-510. Construction of hydroelectric dams — Rights-of-way for railroad in connection with use or construction of dam.

(a) Every company authorized to construct hydroelectric dams in the State of Arkansas, when it becomes expedient or necessary to acquire a right-of-way for the purpose of constructing a railroad for use in connection with or to facilitate the construction of the dam, the companies shall have the power to enter upon, condemn, and appropriate the lands, rights-of-way, easements, and property of persons, firms, or corporations.

(b) The method or manner of making its survey, laying out its right-of-way, acquiring its right-of-way, either by contract or condemnation, shall be the same as now provided by law in case of the exercise of the right of eminent domain by telegraph, telephone, and railroad companies.

(c) It shall be subject to the same duties and liabilities and shall have the same rights as prescribed by law with reference to railroads.

(d) This section shall not be so construed as to authorize the condemnation of public streets or highways.

History. Acts 1929, No. 246, § 1; Pope's Dig., § 5060; A.S.A. 1947, § 73-2017.

Cross References. Dam construction, permits, § 15-22-210.

Publisher's Notes. Acts 1929, No. 246, § 1, is also codified as § 23-18-407.

18-15-511. Declaration of public interest.

The business of generating electricity, transmitting electricity, distributing electricity, or supplying electricity to or for the public for compensation or for public use is declared to be in the public interest.

History. Acts 2001, No. 1291, § 9.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Property Law, 24 U. Ark. Little Rock L. Rev. 549.

18-15-512. Definition of “electric utility”.

(a)(1) As used in this subchapter, “electric utility” means a public utility, as defined in § 23-1-101, that owns or operates for compensation in this state equipment or facilities for producing, generating, transmitting, distributing, selling, or furnishing electricity or another agent for the production of light or electric power to or for the public in this state.

(2) “Electric utility” does not include:

(A) An exempt wholesale generator as defined in § 23-1-101;

(B) Any person not otherwise an electric utility or a business unit of an electric utility that:

(i) Is a power broker who acts as an agent or intermediary on behalf of another person for the purpose of facilitating the sale or purchase of electricity;

(ii) Is a power marketer who acquires, purchases, or generates electric energy on its own behalf with the intent of reselling the electric energy to another person at wholesale;

(iii) Is a qualifying facility that is a cogeneration or small power production facility entitled to the rights and privileges of a qualifying facility under the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2601 et seq.; or

(iv) Is a municipal corporation owning a municipal electric utility; or

(C) An independent transmission system operator, independent transmission company, independent regional transmission group, or other independent transmission entity operating transmission facilities in this state as an independent transmission company, an independent regional transmission group, or other independent transmission entity that is not a public utility, as defined in § 23-1-101.

(b) As used in this section, “person” means an individual or entity, including without limitation a partnership, corporation, cooperative association, trust, business trust, limited liability company, or governmental entity.

History. Acts 2001, No. 1291, § 10; 2013, No. 1130, § 9.

Amendments. The 2013 amendment

redesignated and rewrote the former introductory language as (a)(1); and added (a)(2) and (b).

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2001 Arkansas General As-

sembly, Property Law, 24 U. Ark. Little Rock L. Rev. 549.

SUBCHAPTER 6 — MUNICIPAL CORPORATIONS — WATER AND WATER-GENERATED ELECTRIC COMPANIES

SECTION.

- 18-15-601. Power of eminent domain.
- 18-15-602. Right to draw, control, etc., water.
- 18-15-603. Survey and map required.
- 18-15-604. Petition.

SECTION.

- 18-15-605. Damages — Deposits.
- 18-15-606. Appeals.
- 18-15-607. Tapping of mains and supply pipes, nuisance, and pollution prohibited.

Cross References. Acquiring property for waterworks system by city, § 14-234-215.

Utility Facility Environmental and Economic Protection Act, § 23-18-501 et seq.

Water power companies' right to eminent domain, § 23-18-406.

Effective Dates. Acts 1895, No. 126, § 9: effective on passage.

Acts 1907, No. 130, § 2: effective on passage.

Acts 1931, No. 154, § 3: approved Mar. 20, 1931. Emergency clause provided: "The immediate operation of this act is necessary for the preservation of the public peace, health and safety, and this act shall take effect and be in force and effect from and after its passage."

Acts 1995, No. 1207, § 7: Apr. 11, 1995. Emergency clause provided: "It is hereby found and determined by the General As-

sembly that the supplying of water to the citizens of the state shall be expedited by this act; that there are numerous cities, villages and rural areas desiring to immediately expand their water works facilities to meet the demands of their customers and potential customers; that numerous citizens of the state of Arkansas currently have no stable source of water and can obtain such only through the immediate passage and effectiveness of this act; that the supplying of water and expansion of water facilities shall be expedited by this act; and that this act is necessary for the public health, safety and welfare of the citizens of the state. Therefore, an emergency is hereby declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Review of electric power company's location of transmission line for which condemnation is sought. 19 A.L.R.4th 1026.

Am. Jur. 26 Am. Jur. 2d, Em. Dom., §§ 61, 66.

Ark. L. Rev. Looney, Modification of Arkansas Water Law: Issues and Alternatives, 38 Ark. L. Rev. 221.

C.J.S. 29A C.J.S., Em. Dom., § 35.

U. Ark. Little Rock L.J. Owen, Survey of Arkansas Law: Property, 2 U. Ark. Little Rock L.J. 275.

Comment, Arkansas at the Water Crossroads: Regulations or Solutions?, 7 U. Ark. Little Rock L.J. 401.

18-15-601. Power of eminent domain.

(a) All municipal corporations in this state and all corporations, including not-for-profit corporations and water associations, which supply any town, city, or village in this state, or the inhabitants thereof, with water, or which supply water to rural customers or consumers, are authorized to exercise the power of eminent domain to condemn, take, and use private property for the use of the corporations when necessary to carry out the purposes and objects of the corporations including, without limitation, the condemnation of easements in which water transmission or water distribution lines shall be constructed and located and the condemnation of real property for the construction and location of water storage tanks, water treatment facilities, master metering facilities, pump stations, and other necessary appurtenances needed for water production, transmission, and distribution, regardless of whether or not the private property is located within or outside of the boundaries of the city, town, or village which the municipal or other corporation, including not-for-profit corporations and water associations, serves.

(b) Whenever the municipal or other corporation, including not-for-profit corporations and water associations, in the construction of its waterworks, or in enlarging or extending the waterworks, or water distribution or water transmission lines, shall deem it desirable to condemn, take, use, or occupy private property in the construction of its water treatment or storage facilities, water transmission or distribution lines, or other appurtenances thereto, the corporation may condemn, take, and use the private property, first making just compensation therefor, and proceed as provided in this subchapter.

(c) The corporations and water associations shall exercise the powers of eminent domain only as a last resort, and they shall make use of existing easements and rights-of-way to the extent practicable.

(d) No municipal or other corporation, including not-for-profit corporations and water associations, exercising eminent domain powers under this subchapter shall provide water service to any existing customer of any incorporated city or town absent the express written approval of the incorporated city or town.

History. Acts 1895, No. 126, §§ 1, 2, p. 5037; A.S.A. 1947, §§ 35-401, 35-402; Acts 183; 1907, No. 130, § 1, p. 322; C. & M. 1995, No. 1207, § 1. Dig., §§ 4034, 4035; Pope's Dig., §§ 5035,

RESEARCH REFERENCES

Ark. L. Rev. Looney, Enhancing the Management and Surface Water Utilization in Arkansas, 48 Ark. L. Rev. 643.
Role of Water Districts in Groundwater

CASE NOTES

ANALYSIS

Electric Power.
Rural Development Authorities.

Electric Power.

This section does not give a municipal corporation the power of eminent domain outside the city for the purpose of acquiring a right-of-way for electric transmission lines. *City of Osceola v. Whistle*, 241 Ark. 604, 410 S.W.2d 393 (1966).

Rural Development Authorities.

A corporation formed under provisions of the Rural Development Authority Act, § 14-188-101 et seq., and organized for

the purpose of supplying water to municipalities has the power of eminent domain. *Columbia County Rural Dev. Auth. v. Hudgens*, 283 Ark. 415, 678 S.W.2d 324 (1984).

The legislative intent in enacting §§ 14-188-103, 14-188-109 and 14-188-113, which deleted the power of eminent domain when it was based solely upon the type of corporation which sought to exercise the power, while leaving intact this section, was to stop the delegation of the power of eminent domain based upon the type of entity formed and base it instead upon the purpose served. *Columbia County Rural Dev. Auth. v. Hudgens*, 283 Ark. 415, 678 S.W.2d 324 (1984).

18-15-602. Right to draw, control, etc., water.

(a) When a corporation in the construction of its waterworks, in extending its waterworks, or in making new lines of work shall deem it necessary, it may, as provided in this subchapter, draw water from any river, lake, creek, spring branch, or spring by means of pipes, ditches, drains, conduits, aqueducts, or other means of conducting water so as to connect the rivers, lakes, creeks, spring branches, or springs with its works.

(b) The corporation may also erect and construct dams, bulkheads, gates, and other needed structures and means of controlling the water and its protection and in general do any other act necessary or convenient in accomplishing the purpose contemplated by this subchapter.

History. Acts 1895, No. 126, § 3, p. 154, § 1; Pope's Dig., § 5038; A.S.A. 1947, 183; C. & M. Dig., § 4036; Acts 1931, No. § 35-403.

18-15-603. Survey and map required.

Whenever a corporation proposes to construct or extend the work or proposes to extend its line of works so as to connect with any river, lake, creek, spring branch, or spring and direct the water of any river, lake, creek, spring branch, or spring or body of water within its waterworks, it shall proceed as follows:

(1)(A) That corporation shall cause to be made a survey of the line along which it proposes to construct or extend the waterworks, and of all lands and other property to be affected by flowage, drainage, or by the construction of ditches, drains, conduits, aqueducts, or otherwise.

(B) For that purpose the corporation by its officers and agents may enter any land for the purpose of making the surveys and measurements or for obtaining any other necessary information relative to the

construction or extension of the waterworks, doing no unnecessary damage to the real estate; and

(2)(A) After the survey has been made and the line located, the corporation shall cause to be made a map showing the location of the line, extension, and improvements and the lands necessary to be taken for the construction, extension, or improvement, and all lands or other property to be affected by flowage, drainage, or otherwise.

(B) The map shall be verified under oath by the surveyor making the map as just and correct, as he or she verily believes.

(C) The map shall also be acknowledged by the mayor, clerk, or recorder or other proper officer of the city, town, or village seeking to condemn and take the real estate, or by the president, secretary, or director of the corporation seeking to condemn and take the real estate.

History. Acts 1895, No. 126, § 4, p. 154, § 2; Pope's Dig., § 5039; A.S.A. 1947, 183; C. & M. Dig., § 4037; Acts 1931, No. § 35-404.

18-15-604. Petition.

(a)(1) The municipal corporation or other corporation so intending and desiring to condemn, take, and use the real estate may present to the circuit court in and for the county in which the lands so proposed to be taken, condemned, and used are situated, a petition signed by the president and secretary of the corporation or water association or by the mayor, recorder, or other executive officer of the city, town, or village.

(2) This petition shall set forth a description of the enterprise to be prosecuted by them and describe with reasonable certainty and by reference to the map or plat, or otherwise, the lands, property, and estate which it will be necessary to appropriate, take, use, overflow, drain, or otherwise affect, setting forth the name of each and every owner, encumbrancer, or other person interested in the lands, property, or estate or any part thereof, so far as it can be ascertained by the public records and by view of the premises or other inquiry touching the occupation thereof.

(b) In case the property sought to be condemned is owned by any individual or corporation and is located in more than one (1) county, the petition may be filed in any circuit court having jurisdiction in any county in which the whole or a part of the property may be located, and proceedings had in the circuit court will apply to all the property designated in the petition.

(c) The notice of the filing of the petition and the presentation thereof shall be given to the owners and parties interested as is now prescribed by law for the condemnation of property by railroad, telegraph, and telephone corporations.

(d) The written notice to the landowner shall include a statement that the owner may request, within twenty (20) days of receipt of the notice, that the corporations or associations shall mark and identify the proposed area of the easement on the landowner's property which is the

subject of the eminent domain action, and which shall be done at the expense of the corporation or association.

History. Acts 1895, No. 126, §§ 5, 6, p. 183; C. & M. Dig., §§ 4038, 4039; Pope's Dig., §§ 5040, 5041; A.S.A. 1947, §§ 35-405, 35-406; Acts 1995, No. 1207, § 2.

18-15-605. Damages — Deposits.

(a) The further proceedings in the matter of assessment of damages and the making of deposits to secure the owner shall be the same as is now prescribed by law in reference to condemnation proceedings by railroad, telegraph, and telephone corporations, except that the measure of damages shall be the fair market value of the condemned property at the time of the filing of the petition by the corporation or water association as may be determined by law.

(b) In the case of application for orders of immediate possession by the corporation or water association, if the amount awarded by the jury exceeds the amount deposited by the corporation or water association in an amount which is more than twenty percent (20%) of the sum deposited, the landowner shall be entitled to recover the reasonable attorney's fees and costs.

History. Acts 1895, No. 126, § 6, p. 183; C. & M. Dig., § 4039; Pope's Dig., § 5041; A.S.A. 1947, § 35-406; Acts 1995, No. 1207, § 3; 1999, No. 55, § 1.

CASE NOTES

Attorney's Fees.

The 1995 amendment to this section, made after entry of the order of possession but before trial and entry of the judgment, was procedural in nature and thus retroactive. *City of Ozark v. Nichols*, 56 Ark. App. 85, 937 S.W.2d 686 (1997).

Award of fees as sanctions was reversed because oral representations could not be the basis for sanctions under Ark. R. Civ. P. 11; further, in light of the uncertainty in the statutes, the trial court erred in finding that subsection (b) of this section was inapplicable. *City of Fort Smith v. Carter*, 364 Ark. 100, 216 S.W.3d 594 (2005).

Mortgagees, who were awarded compensation by a jury after eminent domain proceedings were instituted by a city, were not entitled to attorney's fees because the mortgagees had no right of possession in the condemned land. *City of Fort Smith v. Carter*, 372 Ark. 93, 270 S.W.3d 822 (2008).

In a condemnation action, the property owners incurred expenses in successfully defending the appeal. To place them in the same position they were in prior to the

taking by the water district, the appellate court granted their request for attorney's fees and costs that were incurred during their defending of the appeal pursuant to subsection (b) of this section. *Beaver Water Dist. v. Garner*, 102 Ark. App. 188, 283 S.W.3d 595 (2008).

Although drainage was part of the purpose of a city's condemnation, improvement of drainage ancillary to improvement of a public road did not involve the city's exercise of eminent domain relating to waterworks. Therefore, subsection (b) of this section did not apply, and the landowner was not entitled to attorney's fees. *Lois Marie Combs Revocable Trust v. City of Russellville*, 2011 Ark. 186 (2011).

Trial court erred in awarding attorney's fees to a lessee in an airport eminent domain proceeding brought under § 14-362-120 because subsection (b) of this section applied only to municipal corporations and other corporations that supplied water to cities, towns, or rural areas. *Delta Reg'l Airport Auth. v. Gunn*, 2011 Ark. App. 701, 386 S.W.3d 693 (2011).

Circuit court properly denied the owners' request for attorney's fees because

this section was not applicable to the owners' case where the city brought its condemnation action under subchapter 3,

§§ 18-15-301 to 18-51-309. *Giles v. Ozark Mt. Reg'l Pub. Water Auth. of Ark.*, 2014 Ark. 171 (2014).

18-15-606. Appeals.

Appeals may be taken by any party interested from the assessment and allotment of damages under the provisions of this subchapter.

History. Acts 1895, No. 126, § 8, p. 183; C. & M. Dig., § 4041; Pope's Dig., § 5043; A.S.A. 1947, § 35-408.

18-15-607. Tapping of mains and supply pipes, nuisance, and pollution prohibited.

A person shall be guilty of a violation and fined for each and every offense in any sum not exceeding one thousand dollars (\$1,000) if the person shall:

(1) Tap the main or supply pipe of any water plant or company without first obtaining the permission of the proper city authorities, corporation, or owner of the water plant;

(2) Commit nuisance in or near the impounding dam or reservoir of any water plant; or

(3) Pollute the water or affect its wholesome qualities.

History. Acts 1895, No. 126, § 7, p. 183; C. & M. Dig., § 4040; Pope's Dig., § 5042; A.S.A. 1947, § 35-407; Acts 1997, No. 315, § 1; 2005, No. 1994, § 93.

SUBCHAPTER 7 — DAMS, MILLS, ETC.

SECTION.

18-15-701. Findings no bar to prosecution or action under other law — Exception.

18-15-702. Penalty.

18-15-703. Nuisance.

18-15-704. Erection of certain dams permitted.

18-15-705. Petition required.

18-15-706. Issuance of writ — Inquiry by jury.

18-15-707. Summons.

SECTION.

18-15-708. Refusal of permit.

18-15-709. Order.

18-15-710. Rebuilding or repairing dam and mill.

18-15-711. Raising of dam.

18-15-712. Erection of dam by owner of land on one side of water-course.

18-15-713. Cutting canal through another's land.

18-15-714. Right of third person to build.

18-15-701. Findings no bar to prosecution or action under other law — Exception.

The inquest of the jury or the order and permission of the court founded thereupon shall not bar any prosecution or action, which any person would have had in law, had this subchapter not been passed, except for such injuries as were actually foreseen and estimated by the jury.

History. Rev. Stat., ch. 98, § 22; C. & M. Dig., § 3964; Pope's Dig., § 4966; A.S.A. 1947, § 35-522.

18-15-702. Penalty.

Any person who shall build or raise any dam or any other stoppage or obstruction in or across any watercourse without first obtaining permission from the proper court, according to law, and shall thereby work any material injury to any other person by overflowing his or her lands, shall forfeit to the party injured double damages for the injury, to be recovered in a civil action.

History. Rev. Stat., ch. 98, § 23; C. & M. Dig., § 3965; Pope's Dig., § 4967; A.S.A. 1947, § 35-523.

CASE NOTES

Damages.

Plaintiff held not entitled to double damages in absence of showing of willful wrongdoing by defendant. *Turner v. Smith*, 217 Ark. 441, 231 S.W.2d 110 (1950).

18-15-703. Nuisance.

All dams, stoppages, or obstructions not made according to law shall be deemed to be public nuisances and shall be dealt with accordingly.

History. Rev. Stat., ch. 98, § 24; C. & M. Dig., § 3966; Pope's Dig., § 4968; A.S.A. 1947, § 35-524.

18-15-704. Erection of certain dams permitted.

By proceeding as provided in this subchapter, any person may erect a dam across any watercourse not being a navigable stream if the person is the proprietor of the land through which the watercourse runs at the point where he or she proposes to erect his or her dam.

History. Rev. Stat., ch. 98, § 1; C. & M. Dig., § 3943; Pope's Dig., § 4944; A.S.A. 1947, § 35-501.

18-15-705. Petition required.

(a) If a dam is proposed to be erected pursuant to § 18-15-704, the person proposing to erect the dam, if it is likely to overflow any lands on the stream belonging to other persons, shall file his or her petition for that purpose in the circuit court of the county in which he or she proposes to erect his or her mill or other machinery connected with the dam.

(b) If a mill or other dam is proposed to be erected near a county line so as to overflow lands in an adjoining county, then the person

proposing to erect the dam shall apply to the circuit court of both counties for the relief provided in this subchapter.

(c) The petitioner shall set forth:

- (1) A description of the land and an abstract of the title thereto;
- (2) The name of the watercourse;
- (3) A description of the point at which he or she proposes to erect his or her dam;
- (4) The altitude of the dam which he or she proposes to erect; and
- (5) The kind of mill and other machinery which he or she proposes to connect with the dam.

History. Rev. Stat., ch. 98, §§ 3-5; C. & M. Dig., §§ 3945-3947; Pope's Dig., §§ 4946-4948; A.S.A. 1947, §§ 35-503—35-505.

18-15-706. Issuance of writ — Inquiry by jury.

(a)(1) On filing the petition, it shall be the duty of the court to cause a writ of ad quod damnum to be issued under the seal of the court.

(2) The writ shall be directed to the sheriff, commanding him or her to summon twelve (12) fit persons of his or her county to meet at the place where the mill is proposed to be erected or the land overflowed, on a day named in the writ.

(3) Then and there, it shall be the duty of the court to inquire by the jury, touching the matter contained in the petition, a copy of which shall accompany the writ.

(b) It shall be the duty of the sheriff to attend with the jury on the day and at the place appointed, and upon full examination and inquiry by the jury, it shall find:

(1) What will be the amount of damage to each proprietor by reason of inundation consequent upon the erection of the dam as proposed;

(2) Whether the dwelling of any proprietor or the outhouses, curtilages, or gardens thereunto immediately belonging, or orchard, will be overflowed thereby;

(3) Whether, and to what extent, ordinary navigation and the passage of fish will be obstructed by the erection, and whether and by what means the obstructions may be prevented or diminished; and

(4) Whether the health of the neighborhood will be materially endangered in consequence of the erection.

(c) The inquest of the jury shall be reduced to writing and, after being signed by each member of the jury, shall be returned by the sheriff together with the writ, and a statement of the manner in which he or she executed it, into the court which issued it, without delay.

History. Rev. Stat., ch. 98, §§ 7, 8, 11; C. & M. Dig., §§ 4951, 4952, 4955; A.S.A. 1947, §§ 35-507, 35-508, 35-511.

18-15-707. Summons.

(a) Upon the return of the inquest, the court shall cause the proprietor of the land, one (1) acre of which shall have been prayed for, and the several persons, who may be proprietors of the land found by the inquest returned to be liable to damage, to be summoned to appear in the same court on a day to be named in the summons and show cause, if any they can, why the person petitioning should not have permission to erect his or her dam.

(b)(1) If the proprietor resides in the county in which the lands lie, the service of the summons shall be as in ordinary cases.

(2) If the proprietor is not a resident in the county, then the service shall be by setting up a copy at the house of the tenant on the land, or if there is no tenant there, at some conspicuous place on the land.

History. Rev. Stat., ch. 98, §§ 12, 13; C. §§ 4956, 4957; A.S.A. 1947, §§ 35-512, & M. Dig., §§ 3954, 3955; Pope's Dig., 35-513.

18-15-708. Refusal of permit.

If upon a view of the inquest returned by the sheriff and other evidence, if any shall be produced, it shall appear to the court that the dwelling of the proprietor, or outhouses, curtilages, or gardens thereunto belonging, or orchards, or fields will be overflowed, or that the health of the neighborhood will be materially annoyed by the stagnation of the waters consequent upon the erection of the proposed dam, then the court shall not permit the dam to be erected.

History. Rev. Stat., ch. 98, § 14; C. & M. Dig., § 3956; Pope's Dig., § 4958; A.S.A. 1947, § 35-514.

18-15-709. Order.

(a) If upon view it shall appear to the court that none of the evils provided against in § 18-15-708 are likely to ensue, the court shall then consider whether, all circumstances weighed, it is reasonable that the permission to erect the dam as prayed for should be given, and thereupon make an order, giving permission or not accordingly.

(b) The order and decree authorized by subsection (a) of this section and § 18-15-712 and the rights and privileges thereby granted shall, in all cases, be upon and subject to the following conditions:

(1) Such conditions in reference to the obstructions of the passage of fish as the court shall think proper to impose;

(2) That all damages and valuations made and assessed by the jury shall be paid; and

(3) That the dam and mills or other machinery shall be commenced within one (1) year, and they shall be finished and ready for business within three (3) years from the date of the order of permission.

History. Rev. Stat., ch. 98, §§ 15, 17, Pope's Dig., §§ 4959, 4961, 4962; A.S.A. 18; C. & M. Dig., §§ 3957, 3959, 3960; 1947, §§ 35-515, 35-517, 35-518.

18-15-710. Rebuilding or repairing dam and mill.

Whenever the dam and mill or other machinery has been destroyed or materially impaired, they shall be rebuilt or repaired within three (3) years thereafter, but if the owner of the dam and mill is an infant, then the usual saving in favor of infants shall be effective.

History. Rev. Stat., ch. 98, § 19; C. & M. Dig., § 3961; Pope's Dig., § 4963; A.S.A. 1947, § 35-519.

18-15-711. Raising of dam.

Any owner of any dam and mill, or other machinery erected by virtue of this subchapter, may raise his or her dam by permission of the court, under and by the same proceedings, regulations, and conditions provided in this subchapter.

History. Rev. Stat., ch. 98, § 21; C. & M. Dig., § 3963; Pope's Dig., § 4965; A.S.A. 1947, § 35-521.

18-15-712. Erection of dam by owner of land on one side of watercourse.

(a) Any person being the owner in fee simple of the land on one (1) side of a watercourse, including part of the bed of the watercourse at the point where he or she proposes to erect a dam, may erect the dam by proceeding as provided in this subchapter.

(b)(1) The person proposing to erect a dam shall also file his or her petition, and in addition to the requisitions of § 18-15-705, shall set forth the name and place of residence of the proprietor of the land on the other side of the watercourse whereon he or she would abut his or her dam and on what side of the watercourse he or she proposes to erect his or her mill or other machinery in connection with his or her dam.

(2) The petition shall be filed in the county wherein he or she proposes to erect the mill or other machinery.

(c) In this case, the sheriff shall further find by the jury the value of one (1) acre of ground on the opposite side of the watercourse, to include the place where the petitioner would abut his or her dam or build his or her mill or other machinery. The sheriff with the assistance of the jury shall set this one (1) acre of ground apart by metes and bounds.

(d)(1) The sheriff shall notify the proprietor of the land, whereof one (1) acre is prayed for, of the time and place when and where he or she will take the inquest of the jury, if the proprietor is in his or her county, and, if not, the sheriff shall set up the notice at the house of the tenant of the land. If there is no tenant thereof, then the sheriff shall set up the notice at some conspicuous place on the land.

(2) In discharging duties pursuant to this subchapter, the sheriff shall have power with the jury to go into and act in an adjoining county when necessary.

(e) When the party petitioning shall have prayed for one (1) acre of ground whereupon to abut his or her dam, the court shall include in its order granting permission to erect the dam, a decree vesting the acre of land and the title thereof in the party petitioning and his or her heirs and assigns, forever.

(f) In case of noncompliance with any of the conditions concerning building, rebuilding, or repairing, when the land of another has been decreed by the court for the purpose of an abutment, the land shall revert to and revest in the original owner or his or her legal representatives.

History. Rev. Stat., ch. 98, §§ 2, 6, 9, §§ 4945, 4950, 4953, 4954, 4960, 4964; 10, 16, 20; C. & M. Dig., §§ 3944, 3948, A.S.A. 1947, §§ 35-502, 35-506, 35-509, 3951, 3952, 3958, 3962; Pope's Dig., 35-510, 35-516, 35-520.

18-15-713. Cutting canal through another's land.

Where mills or other machinery are proposed to be built, so as to be propelled by water drawn from lakes through canals cut therefrom, and the intended canal will be cut to pass through the land of other persons, the same procedure shall be pursued as in cases of streams.

History. Rev. Stat., ch. 98, § 26; C. & M. Dig., § 3968; Pope's Dig., § 4970; A.S.A. 1947, § 35-526.

18-15-714. Right of third person to build.

If any person or his or her legal representatives to whom permission to erect a dam in virtue of this subchapter has been given shall fail to build, rebuild, or repair the dam, together with the mill or other machinery connected therewith, according to the requisitions of this subchapter or the conditions of the permission, it shall be lawful for any other person owning the land on one (1) side of the watercourse at the point where the dam was erected or was intended to be erected, or owning the land below or above, to build a dam and mill or other machinery thereon, as if no permission had been given, without incurring any liability on account of taking off or backing the water on the dam.

History. Rev. Stat., ch. 98, § 25; C. & M. Dig., § 3967; Pope's Dig., § 4969; A.S.A. 1947, § 35-525.

SUBCHAPTER 8 — NAVIGATION, COAL, AND STONE COMPANIES

SECTION.

- 18-15-801. Navigation companies connecting streams by railroad — Private purchases permitted.
- 18-15-802. Navigation companies connecting streams by railroad — Power of eminent domain.
- 18-15-803. Navigation companies connecting streams by railroad — Petition.
- 18-15-804. Navigation companies connecting streams by railroad — Jury.

SECTION.

- 18-15-805. Navigation companies connecting streams by railroad — Jury report — Payment.
- 18-15-806. Navigation companies connecting streams by railroad — Order to vest land in petitioner.
- 18-15-807. Packet, coal, and stone companies — Power of eminent domain.

Effective Dates. Acts 1869 (Adj. Sess.), No. 48, § 12: effective on passage.

Acts 1909, No. 309, § 4: effective on passage.

RESEARCH REFERENCES

Am. Jur. 26 Am. Jur. 2d, Em. Dom., § 62.
C.J.S. 29A C.J.S., Em. Dom., §§ 37, 38.

18-15-801. Navigation companies connecting streams by railroad — Private purchases permitted.

Nothing in §§ 18-15-802 — 18-15-806 shall prevent a company from making private contracts and purchases of lands from such owners as may be most agreeable to both parties.

History. Acts 1869 (Adj. Sess.), No. 48, § 10, p. 102; C. & M. Dig., § 1756; A.S.A. 1947, § 35-710.

18-15-802. Navigation companies connecting streams by railroad — Power of eminent domain.

(a)(1) Any company formed for the purpose of buying or building and owning one (1) or more steamboats, barges, and flatboats to be used in transporting freight and passengers on any river, lake, bayou, or other navigable stream, shall have the right-of-way, not exceeding two hundred feet (200') in width, over any strip of land connecting two (2) navigable streams, lakes, or bodies of water.

(2) The strip of land shall not be more than five (5) miles in width for the purpose of erecting thereon dirt, plank, or horse railroads, and such

other improvements as may be necessary for the convenience and business of the company.

(b) No other company shall have right-of-way within a less distance than three (3) miles of the way claimed by the company first availing itself of the provisions of this section, § 18-15-801, and §§ 18-15-803 — 18-15-806.

History. Acts 1869 (Adj. Sess.), No. 48, § 4, p. 102; C. & M. Dig., § 1750; A.S.A. 1947, § 35-704.

18-15-803. Navigation companies connecting streams by railroad — Petition.

Any company desiring to avail itself of the benefits of the right-of-way provided for in this subchapter shall petition the county court, or the judge thereof in vacation, of the county in which any lands are situated and over which a right-of-way is desired to appoint a jury of twelve (12) persons, qualified under the laws of this state to serve on juries, whose duties it shall be to appraise and ascertain the value of any lands over which a right-of-way is desired by any company petitioning, and provided for in this section.

History. Acts 1869 (Adj. Sess.), No. 48, § 5, p. 102; C. & M. Dig., § 1751; A.S.A. 1947, § 35-705.

18-15-804. Navigation companies connecting streams by railroad — Jury.

(a) When any company shall petition according to the requirements of § 18-15-803, the county court, or the judge thereof in vacation, shall make an order appointing the jury immediately.

(b) In the order, the jury shall be directed to ascertain and report to the court or judge, within thirty (30) days from the date of their appointments, the value of any lands which, under the provisions of this subchapter, they may be directed to ascertain.

(c) The jury, before entering upon the discharge of their duties, shall take an oath that they will, as nearly as may be, ascertain the number of acres of land by them to be appraised, and report the numbers to the court or judge, together with the average value per acre of the land in cash.

History. Acts 1869 (Adj. Sess.), No. 48, § 6, p. 102; C. & M. Dig., § 1752; A.S.A. 1947, § 35-706.

18-15-805. Navigation companies connecting streams by railroad — Jury report — Payment.

(a)(1) When any jury reports, as provided in § 18-15-804, it shall be the duty of the judge to cause the company to be notified that the report has been made.

(2) If the company shall deposit, within fifteen (15) days after receiving the notice, with the county clerk the full amount of money at which any lands may have been appraised or valued by the jury appointed for that purpose, then the company shall be entitled to the use and possession of the appraised and valued lands.

(b) However, before the company shall be entitled to the use or possession of any lands as provided in this section, the judge shall make an order that the amount deposited with the clerk shall be paid to the owner or owners of the lands.

History. Acts 1869 (Adj. Sess.), No. 48, § 7, p. 102; C. & M. Dig., § 1753; A.S.A. 1947, § 35-707.

18-15-806. Navigation companies connecting streams by railroad — Order to vest land in petitioner.

(a) When any lands shall have been so appraised and valued, when a due report of the appraisement has been made, and when the amount of money has been deposited with the clerk and ordered to be paid as provided in § 18-15-805, it shall be the duty of the judge to make an order upon the records of his or her court that the lands so appraised shall vest in and belong to the company petitioning, as provided in § 18-15-803.

(b) The order shall contain a description of the lands, the amount at which they were valued by the appraisers, the fact that the amount was deposited with the clerk and ordered to be paid over to the original owner or owners, the date of the deposit and order, the names of the original owner or owners, and the corporate name of the company.

(c)(1) When so made and certified by the judge, the order shall be recorded as other deeds of conveyance.

(2) When so made, certified, and recorded, the order shall operate as, and have in law the effect of, conveyance in fee simple from the original owner or owners to the company of the lands named and described in the order.

History. Acts 1869 (Adj. Sess.), No. 48, §§ 8, 9, p. 102; C. & M. Dig., §§ 1754, 1755; A.S.A. 1947, §§ 35-708, 35-709.

18-15-807. Packet, coal, and stone companies — Power of eminent domain.

(a)(1) Any packet company organized under the laws of this state for the purpose of running boats as common carriers upon its navigable waters is given the right of eminent domain to establish landings and loading places upon any of the navigable streams of this state, or upon any creek or bayou emptying thereinto, with the right to deepen and widen the creeks and bayous for a distance not exceeding three (3) miles from their mouths, in order that they may become suitable harbors.

(2) The landing and loading places shall not exceed ten (10) acres in extent at any one (1) place. All steamboats shall have the right to land, load, and unload at the landing places.

(b) Packet companies and also all coal and stone companies are also given the right of eminent domain to condemn a right-of-way not exceeding fifty yards (50 yds.) in width for roads or tram roads, to be built from any navigable stream or creek, or bayou emptying thereinto, to any coal mine or stone quarry, in order that the products of the mines or quarries may be transported to the banks of the navigable rivers or to the creeks or bayous, and the right-of-way may be carried across the right-of-way of any railroad company.

(c) The proceedings for the condemnation of the landing and loading places and rights-of-way shall be, in all things, the same as provided in §§ 18-15-1202 — 18-15-1207.

History. Acts 1909, No. 309, §§ 1-3, p. Dig., §§ 4975-4977; A.S.A. 1947, §§ 35-925; C. & M. Dig., §§ 3973-3975; Pope's 701 — 35-703.

SUBCHAPTER 9 — PUBLIC LANDINGS

SECTION.

- 18-15-901. Establishment.
- 18-15-902. Notice of petition.
- 18-15-903. Landing and cotton yard.
- 18-15-904. Petition to specify land.
- 18-15-905. Appointment and function of viewers.
- 18-15-906. Order for viewers to proceed.
- 18-15-907. Notice of viewers' meeting.
- 18-15-908. Proceedings and report of viewers.
- 18-15-909. Assistance of viewers by surveyor.

SECTION.

- 18-15-910. Consequences of viewers' report.
- 18-15-911. Order to open and maintain landing.
- 18-15-912. Review and appeal.
- 18-15-913. Public entry, use, and occupation upon order of payment.
- 18-15-914. Deposit upon controversy.
- 18-15-915. Lease.
- 18-15-916. Fees and expenses.

Effective Dates. Acts 1909, No. 307, § 21: effective on passage.

RESEARCH REFERENCES

Am. Jur. 26 Am. Jur. 2d, Em. Dom., § 62.
C.J.S. 29A C.J.S., Em. Dom., § 38.

18-15-901. Establishment.

(a) All public landings shall be laid out, opened, and established in a manner agreeable to the provisions of this subchapter.

(b) The county court of each county shall have full power and authority to make and enforce all orders necessary for the establishment of public landings.

History. Acts 1909, No. 307, § 1, p. 916; C. & M. Dig., § 4058; Pope's Dig., § 5061; A.S.A. 1947, § 35-1001.

18-15-902. Notice of petition.

(a)(1) Previous to any petition being presented for a public landing, notice shall be given by publication in some newspaper published in the county, if there is one.

(2) If there is no newspaper published in the county, then notice shall be given by advertisement set up in three (3) public places in the township wherein it is sought to establish the public landing, stating the time when the petition is to be presented to the county court and the substance thereof.

(b) The notice shall be duly authenticated and presented with the petition to the county court.

History. Acts 1909, No. 307, § 4, p. 916; C. & M. Dig., § 4061; Pope's Dig., § 5064; A.S.A. 1947, § 35-1004.

18-15-903. Landing and cotton yard.

(a) Any five (5) or more freeholders residing in any county bordering on the Mississippi River or any other navigable river, bayou, bay, or inlet may petition the county court of that county to cause a lot of ground on the bank of the river, bayou, bay, or inlet to be designated and set apart as a steamboat landing and cotton yard for the use of the public, stating in the petition the name of the owner of the landing proposed to be so taken.

(b) Any one (1) or more of the signers to the petition shall enter bond, with sufficient security, payable to the State of Arkansas for the use of the county, conditioned that the person or persons making application for the establishment of a public landing shall pay into the treasury of the county the amount of all costs and expenses accruing on the petition and the proceedings thereon.

(c)(1) In cases in which the prayer of the petitioners shall not be granted or when proceedings had in pursuance thereof shall not be finally confirmed and established, and on neglect or refusal of the persons so bound, after a liability shall have accrued, to pay into the treasury, according to the tenor of the bond, all costs and expenses that shall have accrued, the clerk of the county court shall deliver the bond to the prosecuting attorney of the district, whose duty it shall be to collect and pay over the bond to the county treasury.

(2) In all cases of contest, the court having jurisdiction of the case shall have power to render judgment for costs according to justice between the parties.

History. Acts 1909, No. 307, § 2, p. 916; C. & M. Dig., § 4059; Pope's Dig., § 5062; A.S.A. 1947, § 35-1002.

18-15-904. Petition to specify land.

All petitions for the laying out and establishment of public landings shall specify the land which is sought to be made a public landing.

History. Acts 1909, No. 307, § 3, p. 916; C. & M. Dig., § 4060; Pope's Dig., § 5063; A.S.A. 1947, § 35-1003.

18-15-905. Appointment and function of viewers.

(a) On presentation of the petition and proof of notice of publication as provided in § 18-15-902, and the county court being satisfied that proper notice has been given in accordance with the provisions of § 18-15-907, the court shall appoint three (3) disinterested citizens of the county as viewers.

(b) The viewers shall be a jury to assess and determine the compensation to be paid in money for the property sought to be appropriated without deduction for benefits to any property of the owner. They shall also assess and determine what damage the owner of the land where the public landing is to be established shall suffer by the establishment of the landing.

History. Acts 1909, No. 307, § 5, p. 916; C. & M. Dig., § 4062; Pope's Dig., § 5065; A.S.A. 1947, § 35-1005.

18-15-906. Order for viewers to proceed.

The county court shall issue its order directing viewers to proceed on the day to be named in the order or, on their failure to meet on that date, within five (5) days thereafter, to:

- (1) View, survey, lay out, and establish the public landing;
- (2) Determine whether the public convenience requires that the public landing shall be established; and
- (3) Report what amount of land is required for the public landing, not exceeding three (3) acres.

History. Acts 1909, No. 307, § 7, p. 916; C. & M. Dig., § 4064; Pope's Dig., § 5067; A.S.A. 1947, § 35-1007.

18-15-907. Notice of viewers' meeting.

(a)(1) It shall be the duty of one (1) of the petitioners to give at least five (5) days' notice in writing to the owners or their agents, if residing within the county.

(2) If the owner is a minor, an individual with intellectual disabilities, or an individual with mental illness, then a petitioner shall give notice to the guardian of the person, if a resident of the county, on whose land the public landing is proposed to be laid out and established, and also five (5) days' notice to the viewers named in the order of the county court of the time and place of meeting as specified in the order.

(b) It is further made the duty of the petitioners, if the public landing is proposed to be laid out or established on any land owned by nonresidents of the counties, to cause notice to be given to the nonresidents of the county by publication for two (2) consecutive weeks in some newspaper published in the county. If there is no newspaper published in the county, then notice shall be given to the nonresidents by posting a notice of the time and place of the meeting of the viewers as specified in the order of the county court. Also the substance of the petition for the public landing shall be posted upon the door of the office of the clerk of the county court for at least two (2) weeks before the time fixed for the meeting of the viewers.

History. Acts 1909, No. 307, § 8, p. 916; C. & M. Dig., § 4065; Pope's Dig., § 5068; A.S.A. 1947, § 35-1008.

18-15-908. Proceedings and report of viewers.

(a)(1) It shall be the duty of the viewers to meet at the time and place specified in the order or within five (5) days thereafter.

(2)(A) After taking an oath or affirmation faithfully and impartially to discharge the duties of their appointments respectively, the viewers shall take to their assistance a surveyor and proceed to view, survey, lay out, and establish the public landing as prayed for in the petition, or as near the same as in their opinion a good public landing can be established and maintained at reasonable expense.

(B) The viewers shall take into consideration the ground, convenience and inconvenience, and expense which will result to individuals as well as to the public if the public landing shall be established as petitioned.

(b) The viewers shall assess and determine the damages sustained by any person on whose premises the public landing is proposed to be established.

(c) The viewers shall make and sign a report, in writing, stating their opinion in favor of or against the establishment of the public landing, which shall set forth the reason for their opinion. The report shall:

(1) Give a description and boundaries of the public landing, so that it can be readily found and located;

(2) State the value of the property sought to be appropriated for the establishment of the public landing; and

(3) State the amount of damages if any, and to whom due, which by them have been assessed and which would accrue by the establishment of the public landing.

History. Acts 1909, No. 307, §§ 9-11, p. 916; C. & M. Dig., §§ 4066-4068; Pope's Dig., §§ 5069-5071; A.S.A. 1947, §§ 35-1009 — 35-1011.

18-15-909. Assistance of viewers by surveyor.

The viewers may call a surveyor to assist them in laying out and surveying any public landing that they may be ordered by the court to lay out and establish.

History. Acts 1909, No. 307, § 6, p. 916; C. & M. Dig., § 4063; Pope's Dig., § 5066; A.S.A. 1947, § 35-1006.

18-15-910. Consequences of viewers' report.

(a) On receiving the report of the viewers, the county court shall cause the report to be read publicly upon the second day of the term.

(b) If no objection shall be made to the report and the court is satisfied that the public landing will be of sufficient importance to the public as to cause the damages and the compensation which have been assessed to be paid by the county, that the assessment is reasonable and just, and that the report of the viewers is favorable thereto, then the court shall order the compensation for the property to be paid to the person entitled thereto from the county treasury, and thenceforth the property shall be considered a public landing.

(c) But if the court shall be of the opinion that the public landing is not of sufficient public utility for the county to pay the assessed compensation and damages and the petitioners refuse to pay the compensation and damages, then the public landing shall not be declared a public landing, and the costs accruing by reason of the application shall be paid by the petitioners as provided in this subchapter.

(d)(1) If the report of the viewers is against the proposed public landing or, if in the opinion of the court, the proposed public landing is not of public utility, then no further proceedings shall be had thereon.

(2) The obligor in the bond securing costs and expenses shall be liable for the full amount of the costs and expenses.

History. Acts 1909, No. 307, § 12, p. 916; C. & M. Dig., § 4069; Pope's Dig., § 5072; A.S.A. 1947, § 35-1012.

18-15-911. Order to open and maintain landing.

After any public landing as provided in this subchapter has been established and declared to be a public landing, the county court shall cause an order to be issued to the overseer of the road district in which the landing is located to open and maintain the landing as a public landing.

History. Acts 1909, No. 307, § 13, p. 916; C. & M. Dig., § 4070; Pope's Dig., § 5073; A.S.A. 1947, § 35-1013.

18-15-912. Review and appeal.

The right to have the county court review the proceedings to establish the public landing and the right to appeal from the final decision of the county court shall:

- (1) Be the same as provided by law; and
- (2) Be exercised in the same manner as provided by the statutes and laws of Arkansas for public roads and highways.

History. Acts 1909, No. 307, § 15, p. 916; C. & M. Dig., § 4072; Pope's Dig., § 5075; A.S.A. 1947, § 35-1015.

18-15-913. Public entry, use, and occupation upon order of payment.

In all cases in which damages for land proposed to be taken for the establishment of a public landing have been assessed in the manner provided in this subchapter and an order has been made for the payment to the owners of the amount so assessed, then it shall and may be lawful for the public to enter upon, use, and occupy the landing as a public landing.

History. Acts 1909, No. 307, § 16, p. 916; C. & M. Dig., § 4073; Pope's Dig., § 5076; A.S.A. 1947, § 35-1016.

18-15-914. Deposit upon controversy.

(a) When the determination of questions in controversy in these proceedings is liable to inconvenience the public, the county court or the county judge, in vacation, shall designate an amount of money to be deposited by the petitioners, subject to the order of the court, for the purpose of making compensation and paying such damages as may be sustained when the amount thereof shall have been assessed as provided in this subchapter.

(b) The court shall designate the place of the deposit, but the sum shall be refunded to the petitioners if the public landing is established and paid for out of county funds.

(c) Whenever deposits have been made in compliance with the order of the court or judge, it shall be lawful for the public, prior to the assessment and payment of damages for the land, to enter upon and use the land as a public landing.

History. Acts 1909, No. 307, §§ 17, 18, p. 916; C. & M. Dig., §§ 4074, 4075; Pope's Dig., §§ 5077, 5078; A.S.A. 1947, §§ 35-1017, 35-1018.

18-15-915. Lease.

(a) The county court may lease a public landing for a term not exceeding three (3) years and the lessee shall transact there only a general receiving and forwarding business.

(b) In case of a lease, the county court shall fix, with power to alter, the schedules of rates and charges for receiving and forwarding freight. The court shall require of the lessee a bond, payable to the county, in a penalty of not less than five hundred dollars (\$500) as shall be proper, conditioned to observe the terms of the lease and to perform the duties imposed on the lessee by law.

(c)(1) The lessee shall keep a schedule of rates conspicuously posted on the premises and shall allow all boats to land at the landing and to receive and discharge freight.

(2) Any failure on the part of the lessee to comply with his or her duties as public landing keeper, or any overcharge of rates, shall subject the lessee and his or her sureties to a penalty of twenty dollars (\$20.00) in favor of the party injured, to be recovered in any court having jurisdiction.

(d) The lease provided in this section shall not abridge the right of any person to forward and receive his or her own freight at the public landing, free of charge.

(e) Any funds arising from lease of public landings shall be paid into the county treasury and constitute a part of the public road fund for the road district wherein the landing is located.

History. Acts 1909, No. 307, §§ 14, 19, Dig., §§ 5074, 5079; A.S.A. 1947, §§ 35-p. 916; C. & M. Dig., §§ 4071, 4076; Pope's 1014, 35-1019.

18-15-916. Fees and expenses.

(a) For each day necessarily employed, to be charged as costs and expenses and paid out of the county treasury, all persons required to render services under the provisions of this subchapter shall receive:

(1) As viewers or reviewers, one dollar and fifty cents (\$1.50) per day;

(2) As chain carriers or markers, one dollar and fifty cents (\$1.50) per day; and

(3) As surveyors, five dollars (\$5.00) per day.

(b) The amount due to each person and the number of days employed shall be certified under oath by the viewers or reviewers.

(c) The county shall be reimbursed for the payments so made and for all other necessary expenses incident to proceedings by the petition, as provided in this subchapter.

(d) The clerk of the county court shall receive the fees as by law he or she may be entitled to, the fees to be taxed as costs and paid as provided in this subchapter.

History. Acts 1909, No. 307, § 20, p. 916; C. & M. Dig., § 4077; Pope's Dig., § 5080; A.S.A. 1947, § 35-1020.

SUBCHAPTER 10 — LEVEE AND DRAINAGE DISTRICTS

SECTION.

- 18-15-1001. Purpose.
- 18-15-1002. Power of eminent domain.
- 18-15-1003. Appraisers.
- 18-15-1004. Petition — Appraisal — Summons.
- 18-15-1005. Exception — Trial — Injunction.
- 18-15-1006. Payment of award — Adjudication of claim.
- 18-15-1007. Refusal to pay award upon abandonment of line.

SECTION.

- 18-15-1008. Appropriation of land without owner's consent.
- 18-15-1009. Limitation on actions and damages.
- 18-15-1010. Fees.
- 18-15-1011. Acquisition of flowage and storage rights and other servitudes.

Cross References. Condemnation of lands beyond district, § 14-121-808.

Consent of state to right of United States for flood control purposes, § 14-120-220.

Lateral ditches by landowners in district, right of eminent domain, § 14-121-804.

Effective Dates. Acts 1939, No. 83, § 3: approved Feb. 15, 1939. Emergency clause provided: "And it appearing that many levee and drainage districts in this state have been delayed in carrying out the objects and purposes for which they were created, which has in many instances worked a hardship on the landowners and taxpayers of said district due to the delay in the acquisition of easements and other agreements concerning the flowage and storage rights, all of

which is detrimental to the public peace, health and safety, which is hereby ascertained, an emergency is hereby declared, and this act shall take effect and be in force from and after its passage."

Acts 1945, No. 177, § 13: approved Mar. 2, 1945. Emergency clause provided: "It is ascertained and hereby declared that the provisions of this act are necessary to aid the levee or drainage districts, or levee and drainage districts, of this state to obtain and receive the benefits of national flood control legislation to protect the people and properties of this state from floods, and this act being necessary for the protection of the public health and safety of the people of this state, an emergency is therefore declared, and this act shall take effect and be in force from and after its passage."

RESEARCH REFERENCES

Am. Jur. 26 Am. Jur. 2d, Em. Dom., §§ 56, 58, 309.

C.J.S. 29A C.J.S., Em. Dom., §§ 40-42.

18-15-1001. Purpose.

It is expressly declared to be the purpose of this section and §§ 18-15-1002 — 18-15-1010 to enable levee and drainage districts in the State of Arkansas to acquire rights-of-way, borrow pits, and such other lands or rights as may be necessary for the purpose of extending, relocating, or draining any additional canal or ditch in any existing drainage district and for the purpose of extending, relocating, resetting, and enlarging any levee constructed by any levee district in the State of

Arkansas without extending the boundaries of the district and without subjecting the lands of any drainage or levee district to taxation or special assessments because of the benefits that will accrue to the district and the lands therein by reason of the additional improvement contemplated, especially with funds of the United States Government, except such additional assessments as may be required on the lands of the district for the purpose of obtaining money with which to meet the requirements of the federal government in providing rights-of-way, borrow pits, and such other rights as the local agencies may be required to provide or furnish.

History. Acts 1945, No. 177, § 11;
A.S.A. 1947, § 35-1111.

18-15-1002. Power of eminent domain.

(a) The board of directors or commissioners of any levee or drainage district organized under the laws of the State of Arkansas are authorized and empowered to enter upon, take, and hold any lands or premises whatever, located either within or without the boundaries of the district, whether by purchase, grant, donation, devise, or otherwise, that may be necessary and proper for the location, relocation, construction, repair, or maintenance of any line of levees, drains, canals, or ditches, which may be authorized or necessary for any levee or drainage district to construct or make for the purpose of relieving any levee or land adjacent thereto from injury, want of drainage, or for the construction of any drain, ditch, or canal authorized to be constructed.

(b) Any district having the authority to construct levees, ditches, drains, or canals is authorized and empowered to cut and remove trees, timber, and other material that may fall or otherwise encumber or endanger the levees, ditches, canals, drains, or any part thereof.

(c) All levee and drainage districts shall have power to acquire by compromise or by agreement with the owner, or if the owner is a minor, an individual with mental illness, or if the lands belong to the estate of a deceased person, then with the guardian, curator, executor, or administrator, all property and right-of-way required by them.

(d)(1) Levee and drainage districts may settle all claims for compensation or damages on account of right-of-way for the construction of levees, ditches, canals, or drains or material for the construction, maintenance, or repair of any levee, drain, canal, or ditch. The executor, administrator, or curator shall be responsible, on his or her bond, for the money or other things received in the settlement.

(2) In case of a settlement, the owner, curator, administrator, or executor shall have the power to convey to the levee or drainage district the right-of-way, material, or other property so required. This conveyance shall vest the levee or drainage district with the title to the right-of-way or property acquired pursuant to this section.

History. Acts 1945, No. 177, § 1; A.S.A. 1947, § 35-1101.

CASE NOTES

ANALYSIS

Damages.
Proceeds from Sale of Timber.

Damages.

In condemnation cases, the landowner is limited to five items of damage: (1) the fair market value of the land appropriated; (2) damage which the construction of the levee will cause by the obstruction of natural drainage; (3) inconvenience of passing over the levee, ditch, drain or canal; (4) the value of crop and houses on the right-of-way injured or destroyed; (5) any easement or flowage right or increased use or servitude. Board of Dirs. v. Morledge, 231 Ark. 815, 332 S.W.2d 822 (1960).

In condemnation cases, the landowner is entitled to recover damages for all property taken or damaged; within such purview is part of the land which will be on one side of the river and part on the other, and the tract which will be practically isolated because of the road when con-

structed. Board of Dirs. v. Morledge, 231 Ark. 815, 332 S.W.2d 822 (1960).

The landowner is entitled to all elements of damages shown to result from the taking of the land, and floodway damages come within such purview. Board of Dirs. v. Morledge, 231 Ark. 815, 332 S.W.2d 822 (1960).

The landowner is entitled to all the damages which may reasonably flow from the taking of his property, and the chancery court acted properly in ascertaining the total value of the landowner's property before the taking and the total value after the taking, in order to determine the damages. Board of Dirs. v. Morledge, 231 Ark. 815, 332 S.W.2d 822 (1960).

Proceeds from Sale of Timber.

Proceeds from the sale of timber which has been grown on an easement right of way obtained partially by condemnation and partially by purchase to protect a levee go to the easement holder and not to the owner of the servient estate. Chicago Mill & Lumber Co. v. Board of Dirs., 236 Ark. 322, 366 S.W.2d 184 (1963).

18-15-1003. Appraisers.

(a)(1) Circuit judges of all counties in which it becomes necessary to condemn right-of-way for the purpose of constructing levees, ditches, drains, or canals, upon the application of the president or secretary of any levee or drainage district, shall appoint three (3) disinterested resident landholders of the county, to be known as appraisers, to assess damages for the appropriation of land for levee and drainage purposes.

(2) The appraisers shall hold their offices for the term of one (1) year and until their successors are duly appointed and qualified. In the event of a vacancy in the office or the removal by an appraiser from the county for which he or she was appointed, then it shall be the duty of the circuit judge, as soon as notified of the vacancy, to fill the unexpired term of the office by appointment.

(3) The appointment shall be made in writing by the circuit judge of the county in which it is necessary to construct a levee, ditch, canal, or drain and shall be filed with the circuit court clerk by the judge, who shall record the appointment in a book to be kept by him or her for that purpose.

(b)(1) The appraisers shall each take an oath before the clerk of the circuit court in their respective counties that they will make a just and true award of the compensation to be paid any landholder, or other person.

(2) The oath shall be recorded in the book provided for the record of the appointment of the appraisers and shall authorize the appraisers severally to enter upon the discharge of their respective duties.

(c) The compensation shall be:

(1) The cash market value of the lands appropriated or intended to be appropriated for either levee, drain, ditch, or canal purposes;

(2) The damage resulting to other lands of the same tract or obstruction to natural drainage, not exceeding the cost of artificial drainage, and the inconvenience, if any, of crossing either the levees, ditches, canals, or drains, from one (1) portion of the tract of land to the other; and

(3) The value of crops and houses on the right-of-way, or the cost of moving the houses.

(d)(1) In the event one (1) or more of the appraisers who may be appointed under the provisions of this section shall be interested in any property to be condemned, the interested appraisers shall not act in the condemnation of the property.

(2) If one (1) or more of the appraisers shall refuse or neglect to act, it shall be the duty of the circuit judge to appoint another appraiser, whose appointment shall be recorded the same as the regular appraiser and who shall take the same oath of office.

History. Acts 1945, No. 177, § 2; A.S.A. 1947, § 35-1102.

CASE NOTES

Cited: Des Arc Bayou Watershed Imp. Dist. v. Finch, 271 Ark. 603, 609 S.W.2d 70 (1980).

18-15-1004. Petition — Appraisal — Summons.

(a) Whenever any levee or drainage district deems it necessary to take, use, or appropriate any right-of-way, land material, or other property for levee, drain, ditch, or canal purposes pursuant to this section, §§ 18-15-1001 — 18-15-1003, and §§ 18-15-1005 — 18-15-1010, or when the right-of-way, land material, or other property has already been entered upon by it or has already been used, taken, or appropriated, then the levee or drainage district, by its president, secretary, attorney, or other authorized agent, may file a petition with the clerk of the circuit court of the county in which the property is situated, describing as near as may be practical the property taken or proposed to be taken and asking that the appraisers make an award to the owners of land or property.

(b)(1) When the petition is filed, a copy of it shall be delivered to each of the appraisers. It shall then be the duty of the appraisers to assemble at some convenient time, enter upon the land or property which has been appropriated or is intended to be appropriated, and ascertain:

(A) The fair market value of the land appropriated, or intended to be appropriated;

(B) The damage which the construction of the levee will cause by the obstruction of natural drainage, not to exceed the cost of artificial drainage; and

(C) The inconvenience of passing over the levee, ditch, drain, or canal or the cost of removing the houses.

(2)(A) The appraisers shall reduce their findings to writing, giving the amount they award:

(i) Per acre for the land appropriated;

(ii) For inconvenience of crossing the levee, ditch, canal, or drain; and

(iii) For the destruction of crops and houses or the cost of removing the houses upon the right-of-way.

(B) The appraisers shall sign the report and file it with the clerk of the circuit court.

(3) However, any levee or drainage district may have the appraisers go on the land and make the appraisal as provided in this section prior to filing its petition in court. Thereafter, if it becomes necessary to file the petition with the clerk of the circuit court of the county, the report of the appraisers may then be filed.

(c)(1) The clerk shall immediately issue a summons directed to the sheriff of the county, together with a copy of the award attached to the summons, commanding him or her to serve the owner if he or she resides in the county or, if the land belongs to a minor, an individual with mental illness, or an estate, to serve the summons upon the guardian, curator, executor, or administrator of the owner and make return thereof.

(2) However, if the owner is a nonresident of the county or is unknown to the officers of the levee or drainage district, it shall be the duty of the clerk to publish a warning order in some newspaper published in the county for four (4) insertions. The warning order may be in the following form and shall be dated and signed by the clerk:

"To (name of supposed owner) and all other persons having any claim or interest in and to the following described land, situated in County, Arkansas, namely: (here describe the land over which the levee or drainage passes according to U.S. Surveys). You are hereby warned to appear in this court within thirty (30) days, and file exceptions to the award which has been filed in this office by the levee and drainage appraisers of this county for the appropriation of the portion of the hereinbefore described land, for the construction or intended construction of a levee, ditch, canal, or drain, as the case may be, over and across the same."

History.

Acts 1945, No. 177, § 3; 1957, No. 100, § 1; A.S.A. 1947, § 35-1103.

Publisher's Notes. It was held in

Staub v. Mud Slough Drainage Dist. No. 1, 216 Ark. 706, 227 S.W.2d 140 (1950), that the provisions of §§ 18-15-1004 and 18-15-1005 limiting damages for obstruction

of drainage to the cost of constructing artificial drainage were unconstitutional.

CASE NOTES

ANALYSIS

Constitutionality.
Damages.

Constitutionality.

Clause limiting amount of damages for obstruction of landowner's natural drainage to an amount "not to exceed the cost of artificial drainage" is in violation of Ark.

Const., Art. 2, § 22. *Staub v. Mud Slough Drainage Dist. No. 1*, 216 Ark. 706, 227 S.W.2d 140 (1950).

Damages.

Landowner was entitled to recover for any damages to his crop and house. *Miller Levee Dist. No. 2 v. Wright*, 195 Ark. 295, 111 S.W.2d 469 (1937) (decision under prior law).

18-15-1005. Exception — Trial — Injunction.

(a)(1) If no exception is filed by the owner within ten (10) days after service of summons or within ten (10) days of the last date of the publication of the warning order, or by the levee or drainage district within ten (10) days after award is filed, then it shall be the duty of the clerk of the circuit court to call the court's attention to the award, and failure to file exception thereto after notice having been given as provided.

(2) Upon this information, the court shall proceed to enter a judgment condemning the property and land for the right-of-way purposes and a judgment in favor of the owner of the land against the levee or drainage district for the amount awarded by the appraisers.

(b) However, in case exceptions are filed by either party within the time prescribed in this section, it shall be the duty of the clerk to docket the cause.

(c) The petition originally filed by the levee or drainage district and the award of the appraisers shall constitute all necessary pleadings in the proceedings, and, in case a trial is demanded or requested by either party, the question shall be tried as other common law cases are tried.

(d)(1) The owner of the land shall be entitled to recover the:

(A) Value of the land appropriated or intended to be appropriated;

(B) Obstruction to natural drainage not to exceed the amount necessary to construct artificial drainage;

(C) Damage occasioned by the inconvenience of crossing the levee, ditch, canal, or drain from one (1) portion of the land to the other; and

(D) Value of any crops or houses on the right-of-way or the cost of removing the crops or houses.

(2) However, whenever any levee or drainage district shall cause any land or property to be appraised, as provided in this section, §§ 18-15-1001 — 18-15-1004, and §§ 18-15-1006 — 18-15-1010, it may enter upon the land and construct the levee, ditch, canal, or drain over and across it without paying the award until such time as the court in any term time shall so order or direct.

(e)(1) It shall be the duty of the court or any county, circuit, or district judge to enjoin any owner of land from interfering with the construction

of any levee, drain, ditch, or canal after an award has been made for the value of the land until such time as the court having proper jurisdiction shall render a final judgment.

(2) In case of an appeal from any judgment rendered by the circuit court, the levee or drainage district, upon filing a supersedeas bond with the Clerk of the Supreme Court, shall be entitled to have the owner of the land enjoined from interfering with the construction of any levee, ditch, drain, or canal until the cause can be heard in the Supreme Court.

History. Acts 1945, No. 177, § 3; 1957, No. 100, § 1; A.S.A. 1947, § 35-1103.

Publisher's Notes. It was held in *Staub v. Mud Slough Drainage Dist. No. 1*, 216 Ark. 706, 227 S.W.2d 140 (1950), that

the provisions of §§ 18-15-1004 and 18-15-1005 limiting damages for obstruction of drainage to the cost of constructing artificial drainage were unconstitutional.

CASE NOTES

ANALYSIS

Constitutionality.
Damages.
Finality of Award.

Constitutionality.

A nonresident landowner is deprived of no constitutional right where a statute provides that his damages shall be assessed by a jury, in condemnation proceedings by a levee district, only when he appears and demands the same within a certain time after due notice by publication. *Young v. Red Fork Levee Dist.*, 124 Ark. 61, 186 S.W. 604 (1916) (decision under prior law).

Clause limiting amount of damages for obstruction of landowner's natural drainage to an amount "not to exceed the cost of artificial drainage" is in violation of Ark. Const., Art. 2, § 22. *Staub v. Mud Slough Drainage Dist. No. 1*, 216 Ark. 706, 227 S.W.2d 140 (1950).

Damages.

Landowner could recover sum in which remaining lands had been damaged, taking into consideration the construction of the levee and the means provided for crossing same. *Miller Levee Dist. No. 2 v.*

Wright, 195 Ark. 295, 111 S.W.2d 469 (1937) (decision under prior law).

Landowner was entitled to recover for any damages to his crop and house. *Miller Levee Dist. No. 2 v. Wright*, 195 Ark. 295, 111 S.W.2d 469 (1937) (decision under prior law).

Lessee operating business on land, part of which was condemned for levee purpose, was not entitled to compensation or damages for increased cost of production or for loss of profits caused by temporary removal of railroad tracks, but only to the reasonable rental value of the land, temporarily taken. *Mobley Constr. Co. v. Fox*, 201 Ark. 646, 146 S.W.2d 905 (1941) (decision under prior law).

Finality of Award.

Where appraisers filed their award, and court thereafter entered a judgment in the amount of the award, the award becomes final if property owners fail to file exceptions to the award within statutory period after service of summons or notice of publication as to filing of award, and the award cannot thereafter be attacked. *Caldarera v. Little Rock-Pulaski Drainage Dist. No. 2*, 215 Ark. 167, 219 S.W.2d 759 (1949).

18-15-1006. Payment of award — Adjudication of claim.

(a)(1) If no exception shall be taken to the award of the appraisers and no appeal taken from any judgment rendered by the circuit court, then the levee or drainage district seeking to condemn the right-of-way

shall pay the award to the person in whose favor the award is made, taking duplicate receipts therefor, one (1) of which shall be attached to the award and filed with the proceedings in the cause.

(2) However, in the event the owner of the land, material, or property is unknown, or if it is uncertain who he or she is, or if there are conflicting claims to the land or to the award, or any part thereof, then the levee or drainage district shall pay the award to the clerk of the circuit court of the proper county for the owner and take the clerk's receipt from the owner and have it recorded in the book provided for the recording of petitions. The clerk and his or her sureties shall be answerable for the safekeeping of the money.

(b)(1) Any claimants to the land may file an application in the circuit court and set up title to the land or property, and after giving notice to all adverse claimants by summons if they are residents of the county, and by warning order if nonresidents of the county or unknown, then the claimants shall have their claim to the money adjudicated and tried as other cases are tried under the rules and practice of the circuit court. Upon a final hearing, the circuit court shall direct a proper disposition of the money.

(2) The judgment shall be a bar to recovery against the levee or drainage district for any other or further compensation or damages for the construction or maintenance of the levee, ditch, drain, or canal.

History. Acts 1945, No. 177, § 4; A.S.A. 1947, § 35-1104.

18-15-1007. Refusal to pay award upon abandonment of line.

Any levee or drainage district may refuse to pay the award which may have been made by any board or appraisers provided for in this section, §§ 18-15-1001 — 18-15-1006, and §§ 18-15-1008 — 18-15-1010, or the judgment of any court assessing the damages for right-of-way and may abandon the line and relocate the levee, drain, ditch, or canal without being liable for any award or judgment rendered in any proceeding for the condemnation of right-of-way, except as to the costs.

History. Acts 1945, No. 177, § 5; A.S.A. 1947, § 35-1105.

CASE NOTES

Costs.

A landowner may recover a reasonable attorney's fee, as well as other expenses, when a condemning agency fails to act in

good faith in instituting and later abandoning condemnation proceedings. *Des Arc Bayou Watershed Imp. Dist. v. Finch*, 271 Ark. 603, 609 S.W.2d 70 (1980).

18-15-1008. Appropriation of land without owner's consent.

(a) Whenever the board of directors or commissioners of any levee or drainage district may have appropriated, or shall appropriate, any land for right-of-way for the construction and maintenance of either levees,

ditches, canals, or drains, and constructed levees or drains thereon without having procured the consent of the owner of the land to construct the levees or drains or without having procured the right-of-way, either by purchase, donations, or condemnation, the owner, when his or her cause of action has not been barred by the statute of limitations, shall have a cause of action against the board of directors or commissioners for the market value of the land at the time it was actually occupied.

(b) The owner may also claim such damages for inconveniences of crossing from one (1) portion of the tract, then owned by the party seeking to recover, to the other portion of the tract, as he or she has sustained, and such damages as the owner may have sustained on account of obstruction of natural drainage to the tract of land over which the levee or drain may have been or shall be constructed, not to exceed the cost of constructing artificial drainage.

History. Acts 1945, No. 177, § 8; A.S.A. 1947, § 35-1108.

Publisher's Notes. The limitation on the amount of damages for the obstruction of a landowner's natural drainage con-

tained in this section was held to be unconstitutional in *Staub v. Mud Slough Drainage Dist. No. 1*, 216 Ark. 706, 227 S.W.2d 140 (1950).

CASE NOTES

Constitutionality.

Limitation on amount of damages for obstruction of landowner's natural drainage to an amount not to exceed the cost of

artificial drainage is in violation of Ark. Const., Art. 2, § 22. *Staub v. Mud Slough Drainage Dist. No. 1*, 216 Ark. 706, 227 S.W.2d 140 (1950).

18-15-1009. Limitation on actions and damages.

(a) All actions for the recovery of damages against any levee or drainage district for the appropriation of land or the construction or maintenance of either levees or drains shall be instituted within one (1) year after the construction of the levees or drains, and not thereafter.

(b) The recovery of damages on account of the construction or maintenance of levees or drains shall be limited and confined to the elements of damage mentioned and provided for in this section, §§ 18-15-1001 — 18-15-1008, and § 18-15-1010.

History. Acts 1945, No. 177, §§ 9, 10; A.S.A. 1947, §§ 35-1109, 35-1110.

CASE NOTES

ANALYSIS

Applicability.

Damages.

Statute of Limitations.

Applicability.

Former similar section applied to all drainage districts where no other statute of limitations was provided. *Hogge v. Drainage Dist. No. 7*, 181 Ark. 564, 26

S.W.2d 887 (1930) (decision under prior law).

Damages.

Landowner could recover sum in which remaining lands had been damaged taking into consideration the construction of the levee and the means provided for crossing levee. *Miller Levee Dist. No. 2 v. Wright*, 195 Ark. 295, 111 S.W.2d 469 (1937) (decision under prior law).

Lessee operating business on partially condemned land was not entitled to compensation or damages for increased cost of production or for loss of profits caused by

temporary removal of railroad tracks, but only to the reasonable rental value of the land temporarily taken. *Mobley Constr. Co. v. Fox*, 201 Ark. 646, 146 S.W.2d 905 (1941) (decision under prior law).

Statute of Limitations.

Statute of limitations runs from time levee is constructed, though the effect of the obstruction is not immediately apparent. *Board of Dirs. v. Barton*, 92 Ark. 406, 123 S.W. 382 (1909); *Russell v. Board of Dirs. of Red River Levee Dist. No. 1*, 110 Ark. 20, 160 S.W. 865 (1913) (preceding decisions under prior law).

18-15-1010. Fees.

(a) The appraisers provided for in this section and §§ 18-15-1001 — 18-15-1009 shall be entitled to receive as compensation for viewing and appraising the land and property and making award of the damage therefor the sum of five dollars (\$5.00) per day for each day in which the appraisers are actually engaged in this service. The sum shall be paid by the levee or drainage districts, as the case may be.

(b)(1) In the event that there are exceptions filed to the award of any board or appraisers, the fees for conducting a trial of the cause shall be the same as are prescribed in ordinary proceedings in the common law court.

(2) The fees shall be paid by the levee or drainage district in all cases in which the judgment of the circuit court is in excess of the award made by the appraisers. The landowners shall pay the cost accruing when the judgment of the circuit court does not exceed the amount awarded by the appraisers.

History. Acts 1945, No. 177, §§ 6, 7; A.S.A. 1947, §§ 35-1106, 35-1107.

18-15-1011. Acquisition of flowage and storage rights and other servitudes.

(a)(1) Whenever it becomes necessary for any levee or drainage district, or levee and drainage district organized under the laws of the State of Arkansas, to acquire flowage and storage rights and other servitudes upon, over, and across any lands in the construction, operation, and maintenance of any floodway, reservoir, emergency reservoir, spillway, or diversion, then the district shall have the full power and authority to acquire the rights by compromise, settlement, or other agreement with the owner.

(2) If the owner is a minor or an individual with mental illness or if the land belongs to the estate of a deceased person, then the curator, guardian, executor, or administrator with the approval of the probate division of circuit court shall have the right and power to make the compromise or settlement and to convey to the levee or drainage district

the easements or other instruments or agreements covering the flowage and storage rights upon, over, and across any lands embraced in the floodway, reservoir, emergency reservoir, spillway, or diversion. The easements, contracts, or agreements, when so executed, shall vest in the districts the right to use the land for the purposes mentioned and set forth in the easement or contract.

(b)(1) If it becomes necessary for any levee or drainage district, or levee and drainage district, to institute condemnation proceedings under Acts 1905, No. 53, and § 14-120-217, to acquire flowage and storage rights and other rights of servitudes over, upon, and across any lands embraced in any floodway, reservoir, emergency reservoir, spillway, or diversion, then all suits shall be prosecuted in the name of the district. If the district so elects, all lands sought to be condemned for these purposes may be embraced and included in one (1) suit.

(2) All of the several and respective owners thereof, or other person, firm, or corporation having an interest therein, shall be made parties defendant. It shall not be necessary or required that the district institute independent and separate suits against the several and respective owners of the land and rights sought to be condemned for these purposes.

History. Acts 1939, No. 83, §§ 1, 2; A.S.A. 1947, §§ 35-1112, 35-1113.

referred to in this section, may have been superseded by §§ 18-15-1001 — 18-15-

Publisher's Notes. Acts 1905, No. 53, 1010.

CASE NOTES

Court Approval.

This section confers authority upon drainage and levee districts to make contracts to acquire all necessary rights of way for the levees and pay incidental damages arising out of construction by the federal government, and to use its surplus

tax collection and revenues for the purchase of rights-of-way without obtaining authority so to do from the county court. Drainage Dist. No. 18, Craighead County v. Cornish, 198 Ark. 857, 131 S.W.2d 938 (1939).

SUBCHAPTER 11 — IRRIGATION COMPANIES

SECTION.

- 18-15-1101. Private property generally.
- 18-15-1102. Drawing or directing water from watercourse.
- 18-15-1103. Condemnation of property upon failure to obtain by consent, contract, or agreement.
- 18-15-1104. Construction across or under railroad.

SECTION.

- 18-15-1105. Right-of-way and construction in city and town.
- 18-15-1106. Construction and repair of bridges across canals.
- 18-15-1107. Supply of water to adjacent landowners.

Effective Dates. Acts 1909, No. 87, § 10: effective on passage.

RESEARCH REFERENCES

Am. Jur. 26 Am. Jur. 2d, Em. Dom.,
§ 82.

C.J.S. 29A C.J.S., Em. Dom., § 36.

18-15-1101. Private property generally.

(a) All corporations organized in this state for the purpose of furnishing water to the public for irrigation of any lands or crops are authorized to exercise the right of eminent domain and to condemn, take, and use private property for the use of the corporations when necessary to carry out the purposes and objects of the corporations.

(b) Whenever a corporation, in the construction of its canals, ditches, drains, conduits, aqueducts, dams, bulkheads, or water gates, or in laying pipes, shall deem it necessary or convenient to condemn, take, use, or occupy private property in the construction of its works or in making new lines of canals or other necessary works, the corporation may condemn, take, and use the private property, first making just compensation for the property, and proceeding as provided in this subchapter.

History. Acts 1909, No. 87, §§ 1, 2, p.
234; A.S.A. 1947, §§ 35-1201, 35-1202.

CASE NOTES

Cited: *Southwestern Water Co. v. Mer-*
ritt, 224 Ark. 499, 275 S.W.2d 18 (1955).

18-15-1102. Drawing or directing water from watercourse.

(a) Whenever a corporation, in the construction of its system of canals, ditches, drains, conduits, aqueducts, or other means of conducting water, shall deem it necessary, it may, as provided in this subchapter, draw water from any river, lake, or creek by any means which the corporation may provide and, in general, do any act necessary or convenient in accomplishing the purpose contemplated by this subchapter.

(b) Whenever a corporation shall propose to construct or extend its canals or works, or shall prepare to extend its system of canals or works, so as to connect with any river, lake, creek, or other watercourse, and to direct the water of the river, lake, creek, or other watercourse within or through its system of canals or works, it shall proceed as follows:

(1)(A) The corporation shall cause to be made a survey of the lines along which it proposes to construct its canals or other works and of all lands or other property to be affected by the canals or other works, or by flowage, drainage, or otherwise.

(B) For that purpose, the corporation by its officers or agents may enter upon any land for the purpose of making surveys and measurements or for obtaining any other necessary information relative to the construction or extension of the system of canals or other works, doing no unnecessary damage to the property; and

(2) After the survey is made and the lines located it shall cause to be made a map showing the location of the lines extension, or improvements, and the lands necessary to be taken for the construction, extension, or improvements, and all lands or other property to be affected by flowage, drainage, or otherwise. The map shall be verified under oath by the surveyor making it as being just and correct as he or she verily believes.

History. Acts 1909, No. 87, §§ 3, 4, p. 234; A.S.A. 1947, §§ 35-1203, 35-1204.

18-15-1103. Condemnation of property upon failure to obtain by consent, contract, or agreement.

In the event a corporation fails, upon application to individuals, corporations, or railroad companies to secure rights-of-way for the canals, drains, or other works by consent, contract, or agreement, then the corporation shall have the right to proceed to procure the condemnation of the property, lands, privileges, and easements in the manner prescribed by law for railroads, as provided by §§ 18-15-1201 — 18-15-1207.

History. Acts 1909, No. 87, § 5, p. 234; A.S.A. 1947, § 35-1205.

CASE NOTES

ANALYSIS

Dismissal for Delay.
Payment of Damages.

Dismissal for Delay.

A corporation's petition for condemning lands for public irrigation should not be dismissed for delay where the same cause was filed, dismissed, and later refiled unless the corporation is given opportunity to explain. *Southwestern Water Co. v. Merritt*, 224 Ark. 499, 275 S.W.2d 18 (1955).

Payment of Damages.

An order condemning lands for public irrigation purposes should be granted a corporation even though its assets are not at that time sufficient to pay for later damages to the land because the corporation cannot enter on the land until the compensation has been paid or secured. *Southwestern Water Co. v. Merritt*, 224 Ark. 499, 275 S.W.2d 18 (1955).

18-15-1104. Construction across or under railroad.

A corporation shall have the right to construct its canals, ditches, drains, conduits, aqueducts, or pipelines across or under any railroad in this state, provided that it does not interfere with the traffic or business

of the railroad company or corporation or in any way lessen the safety of transportation over the railroad.

History. Acts 1909, No. 87, § 6, p. 234;
A.S.A. 1947, § 35-1206.

18-15-1105. Right-of-way and construction in city and town.

(a) The city council of any city of the first class or city of the second class and the town councils of any incorporated towns shall have power to grant an irrigation corporation the right-of-way through the streets of the city or town, with the right to construct any canal, ditch, drain, conduit, aqueduct, pipeline, dam, bulkhead, water gate, or any other necessary works or improvements in the city or town.

(b) However, if any property is damaged thereby, the irrigation corporation shall be liable in damages to the owner of the property, and the damages shall be assessed in the manner provided by law for assessing damages for the appropriation of the right-of-way through lands by railroad companies.

History. Acts 1909, No. 87, § 7, p. 234;
A.S.A. 1947, § 35-1207.

CASE NOTES

Cited: City of Little Rock v. Linn, 245
Ark. 260, 432 S.W.2d 455 (1968).

18-15-1106. Construction and repair of bridges across canals.

(a)(1) Whenever any irrigation corporation in this state constructs its canals, ditches, conduits, aqueducts, pipeline, or any of its works across any public road or highway, or where any public road or highway crosses any irrigation canal or branches thereof, the irrigation corporation shall be required to build a good and sufficient bridge across the canal or branches thereof. The bridge shall be built under the direction of the county judge of the county in which the road crosses the canal or branch thereof.

(2) The irrigation corporation shall keep in good repair all approaches to the bridge so that the elevation or depression of the approaches shall be no greater than one perpendicular foot (1') for every five feet (5') of horizontal distance.

(b) This subchapter shall not apply to the following counties: Ashley, Bradley, Benton, Boone, Carroll, Chicot, Clark, Clay, Columbia, Conway, Crawford, Crittenden, Cross, Dallas, Desha, Drew, Franklin, Garland, Greene, Hempstead, Hot Spring, Howard, Independence, Izard, Johnson, Lafayette, Logan, Lonoke, Madison, Marion, Miller, Mississippi, Monroe, Montgomery, Newton, Ouachita, Phillips, Pike, Polk, Pope, Pulaski, Saline, Scott, Searcy, Sebastian, Union, Van Buren, Washington, White, Woodruff, and Yell.

History. Acts 1909, No. 87, § 8, p. 234; 1953, No. 159, § 1; 1953, No. 407, § 1; A.S.A. 1947, § 35-1208.

18-15-1107. Supply of water to adjacent landowners.

(a) Water shall be supplied to the owners of all lands adjacent to any canal constructed or operated by any such corporation, whenever practicable, upon equal terms and at uniform rates, which shall always be equitable and fair.

(b) However, this subchapter shall not apply to Arkansas County, and Sections 20, 21, 25, 26, 27, 29, 32, 33, 34, 35, and 36, all in Township Two (2) South, Range Six (6) West, of the Fifth Principal Meridian in Prairie County, Arkansas.

History. Acts 1909, No. 87, § 9, p. 234; A.S.A. 1947, § 35-1209.

SUBCHAPTER 12 — RAILROAD, TELEGRAPH, AND TELEPHONE COMPANIES

SECTION.

- 18-15-1201. Definition.
- 18-15-1202. Petition for condemnation.
- 18-15-1203. Appointment of guardian ad litem.
- 18-15-1204. Assessment of damages by jury.

SECTION.

- 18-15-1205. Payment or deposit of damages and costs.
- 18-15-1206. Deposit upon controversy.
- 18-15-1207. Failure to pay or deposit.

Effective Dates. Acts 1873, No. 123, § 11: effective on passage.

Acts 1885, No. 107, § 14: effective on passage.

RESEARCH REFERENCES

Am. Jur. 26 Am. Jur. 2d, Em. Dom., §§ 65, 85, 303-305.
C.J.S. 29A C.J.S., Em. Dom., §§ 32-34.

CASE NOTES

Jurisdiction.

When proceedings under this subchapter are pending in state circuit court to determine just compensation for taking of right of way, United States district court will not attempt to fix such compensation.

DeSalvo v. Arkansas La. Gas Co., 239 F. Supp. 312 (E.D. Ark. 1965).

Cited: City of Bryant v. Springhill Water & Sewer Servs., Inc., 295 Ark. 336A, 750 S.W.2d 61 (1988).

18-15-1201. Definition.

The words "right-of-way", as used in this subchapter, shall mean all grounds necessary for side tracks, turnouts, depots, workshops, water stations, and other necessary buildings.

History. Acts 1873, No. 123, § 8, p. 290; C. & M. Dig., § 4003; Pope's Dig., § 5005; A.S.A. 1947, § 35-207.

CASE NOTES

ANALYSIS

Intermodal Facility.
Stockyards.

Intermodal Facility.

Condemnor railroad company's proposed use of land as an intermodal facility for the receipt and distribution of freight would be proper because as such the intermodal facility would constitute a "depot" within the statutory definition of "right of way." Missouri Pac. R.R. v. 55

Acres of Land, 947 F. Supp. 1301 (E.D. Ark. 1996).

Stockyards.

A stockyard is in fact a depot for the reception of a particular class of freight and is a part of the right-of-way. St. Louis, Iron Mountain & S. Ry. v. Miller County, 67 Ark. 498, 55 S.W. 926 (1900).

Cited: St. Louis & S.F. Ry. v. Tapp, 64 Ark. 357, 42 S.W. 667 (1897); Cloth v. Chicago, Rock Island & Pac. Ry., 97 Ark. 86, 132 S.W. 1005 (1910).

18-15-1202. Petition for condemnation.

(a)(1) Any railroad, telegraph, or telephone company, organized under the laws of this state, after having surveyed and located its lines of railroad, telegraph, or telephone, in all cases in which the companies fail to obtain the right-of-way over the property by agreement with the owner of the property through which the lines of railroad, telegraph, or telephone may be located, shall apply to the circuit court of the county in which the property is situated.

(2) Application shall be made by petition to have the damages for the right-of-way assessed, giving the owner of the property at least ten (10) days' notice in writing by certified mail, return receipt requested, of the time and place where the petition will be heard.

(b)(1) In case the property sought to be condemned is owned by any individual or corporation and is located in more than one (1) county, the petition may be filed in any circuit court having jurisdiction in any county in which the whole or a part of the property may be located.

(2) Proceedings had in the circuit court will apply to all property designated in the petition.

(c) However, if the owner of the property is a nonresident of the state, an infant, or person of unsound mind, notice shall be given as follows:

(1)(A) By publication in any newspaper in the county which is authorized by law to publish legal notices.

(B) The notice shall be published for the same length of time as may be required in other civil causes.

(2) If there is no such newspaper published in the county, then the publication shall be made in some newspaper designated by the circuit clerk, and one (1) written or printed notice thereof shall be posted on the door of the courthouse of the county; and

(3) In writing by certified mail, return receipt requested, to the address of the owners of the property as it appears on the records in the

office of the county sheriff or county tax assessor for the mailing of statements of taxes as provided in § 26-35-705.

(d) The petition shall, nearly as may be, describe the lands over which the road is located and for which damages are asked to be assessed, whether improved or unimproved, and be sworn to.

History. Acts 1873, No. 123, §§ 3, 5, p. 290; 1885, No. 107, § 13, p. 176; C. & M. Dig., §§ 3992-3994, 3996; Pope's Dig., §§ 4994-4996, 4998; A.S.A. 1947, §§ 35-201, 35-203; Acts 1999, No. 1236, § 2.

CASE NOTES

ANALYSIS

Adverse Possession.
Damages.
Defenses.
Diversity Action.
Power to Condemn.
Proceedings.
Remedies.

Adverse Possession.

A railway may acquire a right-of-way by adverse possession. *Memphis & Little Rock R.R. v. Organ*, 67 Ark. 84, 55 S.W. 952 (1899).

Damages.

A life tenant and the remainderman are both entitled to recover for injuries to their particular estate. *Bentonville R.R. v. Baker*, 45 Ark. 252 (1885).

Where a railway company instituted a proceeding against the owner to condemn a right-of-way through land, the defendant's right to recover damages for the taking of the land is not affected by his sale of the land during the pendency of the suit. *Little Rock & Fort Smith Ry. v. Allister*, 68 Ark. 600, 60 S.W. 953 (1901).

The measure of a landowner's compensation is the market value of the land at the time of the taking, for all purposes including its availability for any use to which it is plainly adapted as well as the most valuable purpose for which it can be used. *Fort Smith & Van Buren Dist. v. Scott*, 103 Ark. 405, 147 S.W. 440 (1912).

The compensation of the owner of land is to be estimated by references to any uses for which the property is adapted, having regard for the existing business or wants of the community or such as may reasonably be expected in the immediate future. *Fort Smith & Van Buren Dist. v. Scott*, 103 Ark. 405, 147 S.W. 440 (1912).

Railroad was obligated to pay just compensation based upon the difference in fair market value before and after the taking and it could not dismiss its eminent domain proceeding after order of entry and completion of work but before trial, and restrict its liability only to the damages caused by its occupancy of land. *Thompson v. Thompson*, 253 Ark. 343, 485 S.W.2d 725 (1972).

Defenses.

It is no defense that the company could have used other lands including its own property. *Cloth v. Chicago, Rock Island & Pac. Ry.*, 97 Ark. 86, 132 S.W. 1005 (1910).

Diversity Action.

This section is merely a venue statute, and thus a domesticated foreign corporation exercising its power of eminent domain in federal district court is not required to comply with it. *Missouri Pac. R.R. v. 55 Acres of Land*, 947 F. Supp. 1301 (E.D. Ark. 1996).

Power to Condemn.

A grant of a right-of-way gives no license to overflow the grantor's land by the unskillful construction of a levee on the right-of-way. *St. Louis, Iron Mountain & S. Ry. v. Morris*, 35 Ark. 622 (1880).

The power to condemn may be exercised when necessary and hence is not exhausted by one exercise. *St. Louis, Iron Mountain & S. Ry. v. Petty*, 57 Ark. 359, 21 S.W. 884 (1893).

A railway company acquiring for right-of-way land in which ditch has been made for drainage has no right to obstruct ditch. *St. Louis, Iron Mountain & S. Ry. v. Anderson*, 62 Ark. 360, 35 S.W. 791 (1896).

There is no right to condemn land for depot purposes which another company has already condemned for that purpose.

St. Louis, Iron Mountain & S. Ry. v. Memphis, Dallas & Gulf R.R., 102 Ark. 492, 143 S.W. 107 (1912).

A local zoning ordinance cannot interfere with the legislature's conferral of the power of condemnation to a private entity. *Missouri Pac. R.R. v. 55 Acres of Land*, 947 F. Supp. 1301 (E.D. Ark. 1996).

Proceedings.

These proceedings are to ascertain the compensation to be paid the landowner for the land taken; no provision is made for an issue upon the right to condemn. *Niemeyer & Darragh v. Little Rock Junction Ry.*, 43 Ark. 111 (1884).

The object of the proceeding is to determine the amount of damage for which the railroad company is liable. *Mountain Park Term. Ry. v. Field*, 76 Ark. 239, 88 S.W. 897 (1905).

In a proceeding by a railroad company to condemn property for its right-of-way, the landowner may prove any fact concerning the property which he would naturally be supposed to adduce if he were attempting to sell it to a private individual. *Stuttgart & Rice Belt R.R. v. Koucourek*, 101 Ark. 47, 141 S.W. 511 (1911).

Remedies.

The company alone can put the statutory remedy into operation, and if they neglect to do so, one who is injured by the construction of the railroad has his remedy by action against the company for the

injury sustained. *Bentonville R.R. v. Baker*, 45 Ark. 252 (1885).

Equity will enjoin a railway company from taking possession of land in the construction of its road until proper compensation is made to the owner; and will on timely application also restrain the continuous, unlawful use of land without grant from the owner and without having instituted proceedings as provided in this section. *Niemeyer & Darragh v. Little Rock Junction Ry.*, 43 Ark. 111 (1884); *Organ v. Memphis & Little Rock R.R.*, 51 Ark. 235, 11 S.W. 96 (1888) (preceding decisions prior to the enactment of § 18-15-102).

A right-of-way conveyed to a railway company, though an easement merely, gives to the company a right to exclusive possession for railroad purposes which will support an action of ejectment against one wrongfully in possession. *Graham v. St. Louis, Iron Mountain & S. Ry.*, 69 Ark. 569, 65 S.W. 1048 (1901).

Cited: *St. Louis, Iron Mountain & S. Ry. v. Petty*, 63 Ark. 94, 37 S.W. 300 (1896); *Arkansas & O.R.R. v. St. Louis & S.F.R.R.*, 103 F. 747 (C.C.W.D. Ark. 1900); *Southwestern Water Co. v. Merritt*, 224 Ark. 499, 275 S.W.2d 18 (1955); *Sebastian Lake Devs., Inc. v. United Tel. Co.*, 240 Ark. 76, 398 S.W.2d 208 (1966); *Borden v. Armstrong*, 240 Ark. 1050, 403 S.W.2d 731 (1966); *Cowger v. State, Dep't of Aeronautics*, 307 Ark. 92, 817 S.W.2d 427 (1991).

18-15-1203. Appointment of guardian ad litem.

In all cases of infants or persons with mental illness, when no legal representative or guardian appears in their behalf at the hearing, it shall be the duty of the court to appoint a guardian ad litem, who shall represent their interests for all purposes.

History. Acts 1873, No. 123, § 4, p. 290; C. & M. Dig., § 3995; Pope's Dig., § 4997; A.S.A. 1947, § 35-202.

CASE NOTES

Noncompliance.

It is erroneous to proceed with the trial of a condemnation suit when a person of unsound mind is a party thereto and is not represented by a statutory guardian or a guardian ad litem; however, the proceed-

ing may be vacated at the instance of the party under difficulty only on a showing that that party has a meritorious cause of action or defense. *Hare v. Fort Smith & W.R.R.*, 104 Ark. 187, 148 S.W. 1038 (1912).

18-15-1204. Assessment of damages by jury.

(a) It shall be the duty of the court to impanel a jury of twelve (12) persons, as in other civil cases, to ascertain the amount of compensation which the company shall pay. The matter shall proceed and be determined as other civil causes.

(b) The amount of damages to be paid the owner of the lands for the right-of-way for the use of the company shall be determined and assessed irrespective of any benefit the owner may receive from any improvement proposed by the company.

History. Acts 1873, No. 123, § 5, p. 290; C. & M. Dig., §§ 3997, 3998; Pope's Dig., §§ 4999, 5000; A.S.A. 1947, § 35-204.

CASE NOTES**ANALYSIS**

Constitutionality.
Land Not Taken.
Measure.
Pleadings.
Proof.
Waiver.

Constitutionality.

This section, when read in conjunction with §§ 18-15-1206 and 18-15-1207, fully satisfies both substantive and procedural due process standards of United States Constitution. *DeSalvo v. Arkansas La. Gas Co.*, 239 F. Supp. 312 (E.D. Ark. 1965).

Land Not Taken.

Owner of premises abutting on a street in a city or town may recover from railway company the damages resulting to his premises by the construction of its road-bed or other structures on its right-of-way along the street, in such a manner as to obstruct access to his premises. *Hot Springs R.R. v. Williamson*, 136 U.S. 121, 10 S. Ct. 955, 34 L. Ed. 355 (1890).

Where a landowner whose land is not being taken has suffered a reduction in the market value of his property by the destruction of a street abutting his property, he is entitled to compensation. *Arkansas State Hwy. Comm'n v. Kesner*, 239 Ark. 270, 388 S.W.2d 905 (1965).

A landowner whose land is not being taken is not entitled to compensation for damage of the same kind as that suffered by the public in general, even though the inconvenience and injury to the particular

landowner may be greater in degree than that to others. *Arkansas State Hwy. Comm'n v. McNeill*, 238 Ark. 244, 381 S.W.2d 425 (1964); *Arkansas State Hwy. Comm'n v. Kesner*, 239 Ark. 270, 388 S.W.2d 905 (1965).

Measure.

The inconveniences and disadvantages from the sounding of whistles, the ringing of bells and the rattling of trains, the exposure of the premises to fire, the increased danger of injury to members of the family and livestock are not speculative, but are real and properly included in the measure of damages. *Little Rock, Miss. R. & Tex. Ry. v. Allen*, 41 Ark. 431 (1883).

The manner in which the railroad passing through land cuts it up, the amount and location of the land taken, the inconvenience to the owner in passing from one part of land to another, the absence of proper crossings, and overflowing caused by the road are all proper elements of damages for taking the right-of-way. *Springfield & Memphis Ry. v. Rhea*, 44 Ark. 258 (1884).

The additional fencing rendered necessary by the building of the road is an element of damages, but there is no statute or common-law principle which obliges a railroad corporation to fence its tracks or provide cattle guards where the line traverses improved lands. *St. Louis, Iron Mountain & S. Ry. v. Walbrink*, 47 Ark. 330, 1 S.W. 545 (1886).

Danger to livestock and the frightening of teams employed in the use of land are elements of damages. *Fayetteville &*

Little Rock Ry. v. Combs, 51 Ark. 324, 11 S.W. 418 (1888).

The value of a track previously placed upon a tract of land without the owner's permission could not be included in the valuation of the property for compensation purposes. *Newgass v. St. Louis, Ark. & Tex. Ry.*, 54 Ark. 140, 15 S.W. 188 (1891).

The owner's damages for the right-of-way to a railroad over his land cannot be diminished by the estimated benefit likely to accrue to his remaining property. *St. Louis, Ark. & Tex. R.R. v. Anderson*, 39 Ark. 167 (1882); *Memphis & Little Rock R.R. v. Organ*, 67 Ark. 84, 55 S.W. 952 (1899); *Brown v. Wyandotte & Se. Ry.*, 68 Ark. 134, 56 S.W. 862 (1900); *Little Rock & Fort Smith Ry. v. Allister*, 68 Ark. 600, 60 S.W. 953 (1901).

Although several lots of land sought to be condemned for railroad purposes are separated by an alley, they may be treated as parts of a single tract for the purpose of determining the damages if the testimony shows that they are to be used as a unit. *Kansas City S. Ry. v. Boles*, 88 Ark. 533, 115 S.W. 375 (1908).

Where a railroad has been completed through the plaintiff's land before an action is brought to recover damages for land appropriated for the right-of-way, the plaintiff is entitled to recover the damages to his land, if any, caused by closing the natural outlet for water at the high water season. *Missouri & N. Ark. R.R. v. Bratton*, 92 Ark. 563, 124 S.W. 231 (1909).

The measure of the damages is the market value of the land actually taken and the depreciation of the remaining portion without deducting the benefits that may accrue to the land by reason of the construction of the railroad. *St. Louis, Iron Mountain & S. Ry. v. Theodore Maxfield Co.*, 94 Ark. 135, 126 S.W. 83 (1910).

Pleadings.

It is not necessary for the owner to answer claiming damages to the residue of a tract of land as when a company inaugurates the statutory proceedings, it is presumed that it will perform its whole duty. *Fayetteville & Little Rock Ry. v. Hunt*, 51 Ark. 330, 11 S.W. 418 (1888).

In an action to recover damages for the taking of a right-of-way, the jury may include damages to the plaintiff's land caused by a pond made thereon in the construction of the road, although the complaint alleged no special damages on that score. *Arkansas Cent. R.R. v. Smith*, 71 Ark. 189, 71 S.W. 947 (1903).

Proof.

Witnesses who have personal knowledge of the character and location of the land, and of the facts in regard to building the railroad over it, may give their opinions as to the amount of damages sustained. *Texas & St. Louis Ry. v. Kirby*, 44 Ark. 103 (1884).

Great latitude is allowed the trial court in admitting or rejecting evidence of damages. *Springfield & Memphis Ry. v. Rhea*, 44 Ark. 258 (1884).

Evidence to show that land condemned for a railroad bridge possesses superior advantages as a bridge site is admissible to show the market value. *Little Rock Junction Ry. v. Woodruff*, 49 Ark. 381, 5 S.W. 792 (1887).

Where the defendant in a condemnation suit has, pending the suit, sold the land which the railway company seeks to condemn, he will not be required to show that he received a lower price than he would have received if the railway had not been built. *Little Rock & Fort Smith Ry. v. Allister*, 68 Ark. 600, 60 S.W. 953 (1901).

Owner could offer evidence as to the "before and after" value of the land in condemnation proceeding and witness should be permitted to state factors on which his opinion was based. *Feibelman v. Trunkline Gas Co.*, 234 Ark. 277, 351 S.W.2d 447 (1961).

Waiver.

When the owner conveys the right-of-way by agreement, he waives in advance all damages (except those arising from faulty construction), as it is presumed that the damages are included in the purchase price. *St. Louis, Iron Mountain & S. Ry. v. Walbrink*, 47 Ark. 330, 1 S.W. 545 (1886).

Cited: *Property Owners Imp. Dist. No. 247 v. Williford*, 40 Ark. App. 172, 843 S.W.2d 862 (1992).

18-15-1205. Payment or deposit of damages and costs.

(a) In all cases in which damages for the right-of-way for the use of any railroad company have been assessed in the manner provided in this subchapter, it shall be the duty of the railroad company to deposit with the court or pay to the owners the amount so assessed and pay such costs as, in the discretion of the court, may be adjudged against it, within thirty (30) days after the assessment.

(b) After payment, it shall be lawful for the railroad company to enter upon, use, and have the right-of-way over the lands forever.

History. Acts 1873, No. 123, § 6, p. 290; C. & M. Dig., § 3999; Pope's Dig., § 5001; A.S.A. 1947, § 35-205.

CASE NOTES**ANALYSIS**

Appeals.
Costs.

Appeals.

This section does not prevent railway company from appealing. *Arkansas, La. & Gulf Ry. v. Kennedy*, 84 Ark. 364, 105 S.W. 885 (1907); *Kansas City S. Ry. v. Boles*, 88 Ark. 533, 115 S.W. 375 (1908).

Costs.

Chancellor did not abuse his discretion in adjudging the costs in an eminent domain proceeding against the landowner. *Patterson Orchard Co. v. Southwest Ark. Util. Corp.*, 179 Ark. 1029, 18 S.W.2d 1028 (1929).

18-15-1206. Deposit upon controversy.

(a) In cases in which the determination of questions in controversy in the proceedings is likely to retard the progress of work on or the business of the railroad company, the court, or judge in vacation, shall designate an amount of money to be deposited by the company, subject to the order of the court, for the purpose of making the compensation, when the amount thereof has been assessed and the judge shall designate the place of the deposit.

(b) Whenever the deposit has been made, in compliance with the order of the court or judge, it shall be lawful for the company to enter upon the lands and proceed with the company's work through and over the lands in controversy prior to the assessment and payment of damages for the use and right.

History. Acts 1873, No. 123, § 7, p. 290; C. & M. Dig., §§ 4000, 4001; Pope's Dig., §§ 5002, 5003; A.S.A. 1947, § 35-206.

CASE NOTES

ANALYSIS

Constitutionality.

Interest.

Preemption.

Refund.

Security for Payment.

Constitutionality.

The constitutional provision for a trial by jury to assess the damages refers only to the final assessment, and the power given the judge in this section is not violative of Ark. Const., Art. 17, § 9. *Ex parte Reynolds*, 52 Ark. 330, 12 S.W. 570 (1889).

Condemnation proceedings not being common law actions are valid if they meet the constitutional requirements although they may not provide for a trial in course of the common law. *Board of Dirs. v. Redditt*, 79 Ark. 154, 95 S.W. 482 (1906).

This section, when read in conjunction with § 18-15-1204, fully satisfies both substantive and procedural due process standards of United States Constitution. *DeSalvo v. Arkansas La. Gas Co.*, 239 F. Supp. 312 (E.D. Ark. 1965).

Interest.

A denial of interest on full award from the date of entry upon the lands denied the landowner just compensation, because he had the use of neither the land nor the money until the final judgment was en-

tered. *Housing Auth. v. Rochelle*, 249 Ark. 524, 459 S.W.2d 794 (1970).

Preemption.

Condemnation procedures used by the gas company pursuant to this section were not preempted by 15 U.S.C.S. § 717f(h), as § 717f(h) specifically contemplated the use of state condemnation proceedings under the federal statute. *GSS, LLC v. Centerpoint Energy Gas Transmission Co.*, 2014 Ark. 144, 432 S.W.3d 583 (2014).

Refund.

A railroad company may be refunded its deposit when condemnation proceedings are abandoned. *Reynolds v. Louisiana, Ark. & Mo. Ry.*, 59 Ark. 171, 26 S.W. 1039 (1894).

Security for Payment.

The deposit is security to the landowner for the compensation that he may be finally awarded and is subject to the court's order; none of the parties to the proceedings has a right to withdraw that deposit without an order of the court. *Fort Smith & W.R.R. v. Hare*, 116 Ark. 10, 172 S.W. 835 (1914).

The preliminary deposit designated by circuit court as a condition to entry upon lands is only security for payment of final award rather than tender which may be withdrawn by the landowner. *Housing Auth. v. Rochelle*, 249 Ark. 524, 459 S.W.2d 794 (1970).

18-15-1207. Failure to pay or deposit.

In all cases in which the company shall not pay or deposit the amount of damages assessed within thirty (30) days after the assessment the company shall forfeit all rights in the premises.

History. Acts 1873, No. 123, § 7, p. 290; C. & M. Dig., § 4002; Pope's Dig., §§ 5004; A.S.A. 1947, § 35-206.

SUBCHAPTER 13 — MINERAL OIL, PETROLEUM, NATURAL GAS, AND LUMBER COMPANIES

SECTION.

18-15-1301. Pipelines and logging and tram roads.

18-15-1302. Right to enter, survey, etc. — Plat or map.

SECTION.

18-15-1303. Procedure for condemnation.

18-15-1304. Abandonment of logging railroad or tram road.

Effective Dates. Acts 1905, No. 228, § 5: effective on passage.

Acts 1925, No. 103, § 3: approved Feb. 24, 1925. Emergency clause provided: "This act being necessary for the immedi-

ate preservation of the public peace, health and safety, an emergency is hereby declared to exist, and this act shall be in full force from and after its passage."

RESEARCH REFERENCES

ALR. Fear of powerline, gas or oil pipeline, or related structure as element of damages in easement condemnation proceeding. 23 A.L.R.4th 631.

Am. Jur. 26 Am. Jur. 2d, Em. Dom., §§ 83, 84, 310-313.

C.J.S. 29A C.J.S., Em. Dom., §§ 43, 44.

U. Ark. Little Rock L.J. Owen, Survey of Arkansas Law: Property, 2 U. Ark. Little Rock L.J. 275.

18-15-1301. Pipelines and logging and tram roads.

(a) Any corporation organized by virtue of the laws of this state for the purpose of developing and producing mineral oil, petroleum, or natural gas in this state, and marketing it, or transporting or conveying it by means of pipes from the point of production to any other point, either to refine or to market the oil or to conduct the gas to any point to be used for heat or lights and any corporation organized under the laws of this state for the purpose of manufacturing lumber, and which may find it necessary or expedient to lay out and build a logging railroad or tram road at least five (5) miles in length in order to reach its timber may:

(1) Construct, operate, and maintain a line of pipe for that purpose along and under the public highways and streets of cities and towns with the consent of the authorities thereof; and

(2) Construct logging roads or tramways over and across the lands of any individual or corporation, or across and under the waters and over any lands of the state and on the lands of individuals, and along, under, or parallel with the rights-of-way of railroads and the turnpikes of this state.

(b) The ordinary use of the highways, turnpikes, and railroad rights-of-way shall not be obstructed thereby, nor the navigation of any waters impeded. Just compensation shall be paid to the owners of the land, railroad rights-of-way, or turnpikes, by reason of the occupation of the lands, railroads rights-of-ways, or turnpikes by the pipeline or by the log roads.

(c) The right-of-way for any logging railroad or tram road shall not exceed in width fifty feet (50').

History. Acts 1905, No. 228, §§ 1, 3, p. 577; C. & M. Dig., §§ 3969, 3971; Acts 1925, No. 103, §§ 1, 2; Pope's Dig.,

§§ 4971, 4973; A.S.A. 1947, §§ 35-601, 35-603.

CASE NOTES

ANALYSIS

Constitutionality.
Public Utility.

Constitutionality.

This section does not deny foreign corporations engaged in interstate commerce the same right as domestic corporations, or discriminate against interstate commerce. *Tennessee Gas Transmission Co. v. State*, 232 Ark. 156, 335 S.W.2d 312 (1960).

Public Utility.

A gas company authorized, but not bound, by its charter to operate as a public

utility did not become a public utility merely by virtue of this section, where the company did nothing pursuant to the terms of this section or in any other respect to make itself a public utility. *Clear Creek Oil & Gas Co. v. Fort Smith Spelter Co.*, 148 Ark. 260, 230 S.W. 897 (1921).

Cited: *St. Louis & S.F. Ry. v. James*, 161 U.S. 545, 16 S. Ct. 621, 40 L. Ed. 802 (1896); *DeSalvo v. Arkansas La. Gas Co.*, 239 F. Supp. 312 (E.D. Ark. 1965).

18-15-1302. Right to enter, survey, etc. — Plat or map.

(a)(1) Whenever a corporation desires to construct a pipeline or build a logging railway upon or under the lands of individuals, or right-of-way of any railroad, or any turnpike, the corporation, by its agents, shall have the right to enter peacefully upon the lands or rights-of-way and survey, locate, and lay out its pipeline, thereon, or tram road or logging road.

(2) However, the corporation shall be liable for any damages that may result by reason of such acts.

(b) The corporation shall designate on a plat or map to be made and filed with the county clerk of the county the width of the strip of land needed to be condemned for its purposes, the land's location, and the depth to which the pipes are to be laid.

History. Acts 1905, No. 228, § 3, p. 103, § 2; Pope's Dig., § 4973; A.S.A. 1947, 577; C. & M. Dig., § 3971; Acts 1925, No. § 35-603.

18-15-1303. Procedure for condemnation.

In the event any company fails, upon application to individuals, railroads, or turnpike companies, to secure the right-of-way by consent, contract, or agreement, then the corporation shall have the right to proceed to procure the condemnation of the property, lands, rights, privileges, and easements in the manner provided by law for taking private property for right-of-way for railroads as provided by §§ 18-15-1201 — 18-15-1207, including the procedure for providing notice by publication and by certified mail in § 18-15-1202.

History. Acts 1905, No. 228, § 2, p. § 4972; A.S.A. 1947, § 35-602; Acts 1999, 577; C. & M. Dig., § 3970; Pope's Dig., No. 1236, § 3.

18-15-1304. Abandonment of logging railroad or tram road.

When a logging railroad or tram road is abandoned, the right-of-way shall revert to the owners of the lands over which it crosses.

History. Acts 1905, No. 228, § 3, p. 103, § 2; Pope's Dig., § 4973; A.S.A. 1947, 577; C. & M. Dig., § 3971; Acts 1925, No. § 35-603.

SUBCHAPTER 14 — CEMETERIES

SECTION.

- 18-15-1401. Right of eminent domain to take land for burial purposes.
- 18-15-1402. Consent of two-thirds of members or owners required.
- 18-15-1403. Application.

SECTION.

- 18-15-1404. Setting of time for inquiry.
- 18-15-1405. Summoning of jury for inquiry.
- 18-15-1406. Determination of compensation — Dispute.
- 18-15-1407. Costs.
- 18-15-1408. Public property.

A.C.R.C. Notes. References to "this subchapter" in §§ 18-15-1401 — 18-15-1407 may not apply to § 18-15-1408 which was enacted subsequently.

Effective Dates. Acts 1935, No. 163, § 8: approved Mar. 21, 1935. Emergency

clause provided: "This act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in force from and after its passage."

RESEARCH REFERENCES

Am. Jur. 26 Am. Jur. 2d, Em. Dom., §§ 55, 308.

C.J.S. 29A C.J.S., Em. Dom., § 46.

18-15-1401. Right of eminent domain to take land for burial purposes.

(a) All cities of the first class and cities of the second class and incorporated towns, cemetery or burial associations, and persons owning land used for public burial purposes in the State of Arkansas are given and granted the right of eminent domain to condemn, take, and use land for public burial purposes.

(b) Power of eminent domain granted by this section may also be used to acquire land for the burial of veterans of the United States Armed Forces and their dependents, and the land may be transferred to the United States Department of Veterans Affairs, any other agency of the federal government, or to any other entity for use as a cemetery for veterans of the United States Armed Forces and their dependents.

(c) All entities granted the power of eminent domain under this section may accept donations from individuals or other legal entities for

the purpose of compensating landowners for property acquired by eminent domain.

(d) The right of eminent domain granted by this section shall be exercised as provided in this subchapter.

History. Acts 1935, No. 163, § 1; Pope's Dig., § 9965; A.S.A. 1947, § 35-801; Acts 1989, No. 542, § 1.

CASE NOTES

Cited: *Young v. Energy Transp. Sys.*, 278 Ark. 146, 644 S.W.2d 266 (1983).

18-15-1402. Consent of two-thirds of members or owners required.

No property shall be condemned and taken for public burial purposes by any city of the first class or city of the second class or incorporated town, cemetery or burial association, or persons owning land used for public burial purposes without the concurrence in the bylaws, resolutions, or ordinances directing the same of two-thirds ($\frac{2}{3}$) of the whole number of members elected to the council of the city or town, or without the consent of two-thirds ($\frac{2}{3}$) of the members of the cemetery or burial association, and persons owning land used for public burial purposes.

History. Acts 1935, No. 163, § 2; Pope's Dig., § 9966; A.S.A. 1947, § 35-802.

18-15-1403. Application.

(a) When it shall be deemed necessary by the city or town, cemetery or burial association, or persons owning land used for public burial purposes to take private property for burial purposes, an application in writing shall be made to the circuit court of the proper county or the judge thereof in vacation, describing as correctly as may be, the property to be taken and the name of the owner of the land proposed to be condemned and taken.

(b)(1) Notice of the time and place of the application shall be given, either personally in the ordinary manner of serving process on the owner of the property or by publishing a copy of the application with a statement of the time and place at which it is to be made for three (3) weeks next preceding the time of application in some newspaper of general circulation in the county.

(2) The personal service as provided for in this section shall be made at least ten (10) days before the time of application when the owner is a resident of the county where the property is situated.

(3) The publishing of the notice of application in some newspaper of general circulation in the county where the property is situated shall be legal notice to the owner of the property when the owner is not a resident of the county where the property is situated.

History. Acts 1935, No. 163, § 3; Pope's department of Health necessary, § 20-17-Dig., § 9967; A.S.A. 1947, § 35-803. 901 et seq.

Cross References. Application to De-

18-15-1404. Setting of time for inquiry.

If it shall appear to the court or judge that notice has been served ten (10) days before the time of application, or has been published, and that the notice is reasonably specific and certain, then the court or judge shall set a time for the inquiry into the assessment of compensation by a jury before the court or judge.

History. Acts 1935, No. 163, § 4; Pope's Dig., § 9968; A.S.A. 1947, § 35-804.

18-15-1405. Summoning of jury for inquiry.

(a) A jury shall be summoned for the purpose of making the inquiry in the same manner that petit jurors are summoned in the circuit court for other purposes when the circuit court is regularly in session. If the hearing is before the judge out of term time, then the jury shall be summoned on order of the judge by the sheriff of the county.

(b) The inquiry and assessment shall be made at the time appointed unless for good cause it is continued to another day to be specified.

History. Acts 1935, No. 163, § 5; Pope's Dig., § 9969; A.S.A. 1947, § 35-805.

18-15-1406. Determination of compensation — Dispute.

(a) The jury shall hear the evidence and determine the amount of compensation to be paid to the owners of the property so condemned.

(b)(1) In case of dispute as to the ownership, title, or interest of the property condemned, the amount of compensation determined by the jury may be paid into the court by the city or town, cemetery or burial association, or persons owning land used for public burial purposes.

(2) The right to the funds so paid in may be determined between the parties making claim thereto and the city or town, cemetery or burial association, or persons owning land used for public burial purposes may proceed to actually take the property after the payment into court as provided in this section.

History. Acts 1935, No. 163, § 6; Pope's Dig., § 9970; A.S.A. 1947, § 35-806.

18-15-1407. Costs.

The cost of the condemnation proceedings provided for in this subchapter shall be paid by the city or town, cemetery or burial association, or persons owning land used for public burial purposes instituting the condemnation proceeding, except costs of review or appeal or any other proceeding taken by the owner of the property after

the assessment of compensation is made by the jury as provided for in this subchapter.

History. Acts 1935, No. 163, § 7; Pope's Dig., § 9971; A.S.A. 1947, § 35-807.

18-15-1408. Public property.

(a) If a cemetery located on land of a private landowner has been open to public use for a period of at least fifty (50) years, then the cemetery shall be deemed to be public property unless:

(1) The property has been enclosed by the landowner for at least one (1) year prior to an order of the quorum court providing for the care and management of the cemetery as provided for under subsection (b) of this section; or

(2) The cemetery has been operated by the landowner for at least one (1) year prior to an order of the quorum court providing for the care and management of the cemetery as provided for under subsection (b) of this section.

(b)(1) If, upon the petition of any person, the quorum court determines that a cemetery is public property under this section, the quorum court may issue an order providing for the management and care of the cemetery. The county may manage and care for the cemetery or may enter into an agreement allowing a nonprofit association or corporation to provide for the management and care of the cemetery.

(2) Upon issuing an order for the management and care of the public property, the quorum court shall notify the landowner of its order, based on the quorum court's finding that the property has become public property, and shall include a copy of the provisions of this section. The notice shall be by certified mail.

(3) No person or his or her heirs shall have, sue, or maintain any action or suit, either in law or equity, for any cemetery lands more than six (6) months after the person receives the notice required under this section.

(c) The rights of the public to cemetery property under this section shall be in the nature of an adverse possession. No additional conditions for adverse possession shall be imposed in addition to those provided by this section.

History. Acts 1995, No. 716, § 1.

A.C.R.C. Notes. References to "this subchapter" in §§ 18-15-1401 — 18-15-

1407 may not apply to this section which was enacted subsequently.

SUBCHAPTER 15 — HOUSING AND URBAN RENEWAL

SECTION.

- 18-15-1501. Federal housing projects —
Legislative declarations.
18-15-1502. Federal housing projects —
Definition.

SECTION.

- 18-15-1503. Federal housing projects —
Right of eminent domain.
18-15-1504. Housing authorities —
Power of eminent domain.

SECTION.

18-15-1505. Urban renewal agencies.

Cross References. Participation in federal programs, § 14-169-901 et seq.

Effective Dates. Acts 1935, No. 177, § 5: approved Mar. 21, 1935. Emergency clause provided: "It is determined and declared that the existence of unsanitary and unsafe dwelling accommodations in the State cause an increase in and spread of disease and crime and that it is necessary for the preservation of the public peace, health and safety that this act become effective without delay. This act, therefore, will take effect and be in full force from and after its passage."

Acts 1937, No. 298, § 31: approved Mar. 23, 1937. Emergency clause provided: "It is determined and declared that unemployment and the existence of unsafe, insanitary and congested dwelling accommodations have produced an alarming economic condition in the State and con-

stitute an emergency and that it is necessary for the preservation of the public peace, health and safety that this act become effective without delay. This act, therefore, shall take effect and be in full force from and after its passage."

Acts 1971, No. 542, § 3: Apr. 6, 1971. Emergency clause provided: "Whereas, urban renewal agencies in order to receive federal assistance must be able to acquire real property to carry out plan objectives and, whereas, the power of eminent domain of urban renewal agencies needs to be clarified and affirmed in order that urban renewal plan objectives not be jeopardized, an emergency is hereby declared to exist and this Act being necessary for the immediate protection of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

Am. Jur. 26 Am. Jur. 2d, Em. Dom., §§ 78-80.

C.J.S. 29A C.J.S., Em. Dom., § 49.

18-15-1501. Federal housing projects — Legislative declarations.

(a) It is declared that:

(1) Unsanitary and unsafe dwelling accommodations exist in various areas of the state and that consequently many persons of low income are forced to reside in such dwelling accommodations;

(2) These conditions cause an increase in, and spread of, disease and crime and constitute a menace to the health, safety, morals, and welfare of the citizens of the state and impair economic values;

(3) The clearance, replanning, and reconstruction of the areas in which unsanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which private property may be acquired; and

(4) It is in the public interest that work on the projects be instituted as soon as possible in order to relieve unemployment which now constitutes an emergency.

(b) The necessity in the public interest for the provisions of this subchapter is declared as a matter of legislative determination.

History. Acts 1935, No. 177, § 1; Pope's Dig., § 5083; A.S.A. 1947, § 35-1301.

18-15-1502. Federal housing projects — Definition.

(a) The term "housing project" whenever used in this section, § 18-15-1501, and § 18-15-1503 shall mean any undertaking:

(1) To demolish, clear, remove, alter, or repair unsafe or unsanitary housing; or

(2) To provide dwelling accommodations for persons of low income.

(b) The term may also include such buildings and equipment for recreational or social assemblies for educational, health, or welfare purposes and such necessary utilities as are designed primarily for the benefit and use of the occupants of the dwelling accommodations.

History. Acts 1935, No. 177, § 2; Pope's Dig., § 5084; A.S.A. 1947, § 35-1302.

18-15-1503. Federal housing projects — Right of eminent domain.

(a)(1) Any corporation which is an agency of the United States of America shall have the right to acquire by eminent domain any real property, including improvements and fixtures thereon, which it may deem necessary for a housing project being constructed, operated, or aided by it or the United States of America.

(2) Any corporation borrowing money or receiving other financial assistance from the United States of America, or any agency thereof, for the purpose of financing the construction or operation of any housing project, the operation of which will be subject to public supervision or regulation, shall have the right to acquire by eminent domain any real property, including fixtures and improvements thereon, which it may deem necessary for the project.

(3) A housing project shall be deemed to be subject to public supervision or regulation within the meaning of this section, § 18-15-1501, and § 18-15-1502 if the rents to be charged are in any way subject to the supervision, regulation, or approval of the United States of America, the state or any of their subdivisions or agencies, or by a housing authority, city, municipality, or county, whether the right to supervise, regulate, or approve is by virtue of any law, statute, contract, or otherwise.

(b) Any corporate agency of the United States of America or any such corporation, upon the adoption of a resolution declaring that the acquisition of the property described therein is in the public interest and necessary for public use, may exercise the power of eminent domain:

(1) In the manner now provided for taking private property for rights-of-way for railroads as provided by §§ 18-15-1202 — 18-15-1207;

(2) In the manner provided for condemnation by municipal corporations and counties as provided by §§ 18-15-301 — 18-15-307; or

(3) Pursuant to any other applicable statutory provision enacted for the exercise of the power of eminent domain.

History. Acts 1935, No. 177, § 3; Pope's Dig., § 5085; A.S.A. 1947, § 35-1303.

18-15-1504. Housing authorities — Power of eminent domain.

(a) A housing authority shall have the right to acquire by the exercise of the power of eminent domain any real property which it may deem necessary for its purposes under this subchapter after the adoption by it of a resolution declaring that the acquisition of the real property described in it is necessary for those purposes.

(b) An authority may exercise the power of eminent domain in the manner prescribed in §§ 18-15-1202 — 18-15-1207 for condemnation by railroad corporations in this state, or it may exercise the power of eminent domain in the manner provided by any other applicable statutory provisions for the exercise of the power of eminent domain.

(c)(1) Property already devoted to a public use may be acquired in like manner.

(2) However, no real property belonging to the city, the county, the state, or any political subdivision thereof may be acquired without its consent.

History. Acts 1937, No. 298, § 12; Pope's Dig., § 10070; A.S.A. 1947, § 19-3015.

Publisher's Notes. Acts 1937, No. 298, § 12, is also codified as § 14-169-219.

CASE NOTES

Cited: L.C. Eddy, Inc. v. City of Arkadelphia, 303 F.2d 473 (8th Cir. 1962); Housing Auth. v. Rochelle, 249 Ark. 524, 459 S.W.2d 794 (1970); Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 778 F.2d 404 (8th Cir. 1985).

18-15-1505. Urban renewal agencies.

(a)(1)(A) From and after the passage of this act, any urban renewal agency in this state created pursuant to the provisions of §§ 14-169-601 — 14-169-609, 14-169-701 — 14-169-713, and 14-169-801 shall have the power of eminent domain to carry out urban renewal plan objectives.

(B) The procedure to be followed by the urban renewal agency to acquire property by eminent domain shall be that the board of commissioners shall, by resolution, declare that:

(i) The acquisition of certain real property is necessary for urban renewal plan objectives which have been approved by the governing body of the municipal government after a public hearing;

(ii) Negotiations for acquisition have been unsuccessful; and

(iii) Suit is authorized to condemn the property.

(2)(A) An urban renewal agency may exercise the power of eminent domain in the manner prescribed by law for condemnation by

railroad corporations in this state as prescribed by §§ 18-15-1202 — 18-15-1207 and acts amendatory thereof or supplementary thereto.

(B) The urban renewal agency may exercise the power of eminent domain in the manner provided by any other applicable statutory provisions for the exercise of the power of eminent domain.

(b) It is the intent of this section to affirm the power of urban renewal agencies to exercise the power of eminent domain to acquire real property to carry out urban renewal plan objectives.

History. Acts 1971, No. 542, §§ 1, 2; A.S.A. 1947, §§ 19-3075, 19-3076.

Publisher's Notes. Acts 1971, No. 542, §§ 1 and 2, are also codified as § 14-169-802.

In reference to the term "passage of this act," Acts 1971, No. 542, was signed by the Governor and became effective on April 6, 1971.

SUBCHAPTER 16 — TRACTION COMPANIES

SECTION.

18-15-1601. Authority to condemn.

Effective Dates. Acts 1901, No. 90, § 6: effective on passage.

18-15-1601. Authority to condemn.

(a)(1) Every traction company shall have the right to survey its lines, lay out its road, acquire its right-of-way not exceeding two hundred feet (200') in width, and, where necessary to acquire the right-of-way, shall have the power to enter upon, condemn, and appropriate the lands, rights-of-way, easements, and property of persons, firms, or corporations.

(2) The method and manner of making the traction company's surveys, laying out its railways, or acquiring its right-of-way, either by contract or condemnation, shall be the same as provided by law in case of the exercise of the right of eminent domain by telegraph, telephone, and railroad companies, under §§ 18-15-1201 — 18-15-1207, and it shall be subject to the same duties and liabilities and have the same rights as prescribed in those sections with reference to railroads.

(b) However, this section shall not be construed so as to authorize the condemnation of public streets or highways.

History. Acts 1901, No. 90, § 3, p. 155; C. & M. Dig., §§ 1759, 4042; Pope's Dig., § 5044; A.S.A. 1947, § 35-208.

Publisher's Notes. Pursuant to the remainder of Acts 1901, No. 90, which was

superseded by § 4-26-101 et seq., "traction companies" were corporations formed for the purpose of operating interurban electric roads and furnishing light and power to consumers.

SUBCHAPTER 17 — PRIVATE PROPERTY PROTECTION ACT

SECTION.

18-15-1701. Title.

18-15-1702. Definitions.

18-15-1703. Taking — Application.

SECTION.

18-15-1704. Statute of limitations.

18-15-1705. Cumulative remedies.

18-15-1706. Appeals.

A.C.R.C. Notes. Acts 2015, No. 1002, § 1, provided: “Legislative findings. The General Assembly finds that:

“(1) From time to time, state and local regulatory programs have the effect of reducing the market value of private property;

“(2) When state and local regulatory programs reduce the market value of private property and do not abate through their implementation a public nuisance affecting the public health, safety, morals, or general welfare, it is fair and appropriate that the state or the locality compensate the property owner for the loss in market value of the property caused by the implementation of the regulatory program;

“(3) Compensation to the property owner is also fair and appropriate in cases involving regulatory programs that abate a public nuisance when the property owner did not contribute to the public nuisance, did not acquire the property knowing of the public nuisance, or did not acquire the property under circumstances in which the property owner should have known about the public nuisance based upon prevailing community standards; and

“(4) In order to establish a fair and equitable compensation system to address these stated public policy concerns and findings, the General Assembly should establish a compensation system.”

Effective Dates. Acts 2015, No. 1002, § 4: Apr. 2, 2015. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that some actions by a governmental unit reduce the value of real property; that the property owners now are not being compensated for that reduction in value; and that this act is immediately necessary because the inequity needs to be eliminated as soon as possible. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

18-15-1701. Title.

This subchapter shall be known and may be cited as the “Private Property Protection Act”.

History. Acts 2015, No. 1002, § 2.

18-15-1702. Definitions.

As used in this subchapter:

(1) “Fair market value” means the price a willing buyer would pay a willing seller after considering all factors in the marketplace that influence the price of private real property;

(2) "Governmental unit" means the state and any of its agencies or political subdivisions;

(3) "Owner" means a person with legal or equitable title to affected private real property at the time a taking occurs;

(4) "Real property" means real property, the use of which is directly controlled or regulated by a regulatory program;

(5)(A) "Regulatory program" means a rule, regulation, law, or ordinance that affects the fair market value of real property.

(B) "Regulatory program" includes without limitation moratoriums on growth, aesthetic or scenic districts, environmental districts, overlay districts, green space ordinances, landscape ordinances, tree ordinances, land use planning programs, and zoning programs by a governmental unit when the regulatory program is not designed to carry out or protect the adopted plans of a governmental unit that are designed to protect the health, safety, or welfare of the citizens.

(C) "Regulatory program" does not include a moratorium enacted to give a municipality time to adopt or amend plans and ordinances; and

(6) "Territorial jurisdiction" means the territorial jurisdiction of a municipality as described in § 14-56-413.

History. Acts 2015, No. 1002, § 2.

18-15-1703. Taking — Application.

(a)(1) An owner of real property asserting a taking under this subchapter shall bring a cause of action in circuit court claiming that the implementation of a regulatory program by a governmental unit has permanently reduced by at least twenty percent (20%) the fair market value of the real property.

(2) The reduction in the fair market value of the real property shall be determined by comparing the fair market value of the real property as if the regulatory program is not in effect and the fair market value of the real property determined as if the regulatory program is in effect.

(3) To assert that a taking has occurred, the regulatory program must have been implemented at the time the owner acquired title or after April 2, 2015, whichever is later.

(4) Upon a preponderance of the evidence, the real property shall be deemed to have been taken for the use of the public.

(b) A jury shall determine the amount of the difference in fair market value.

(c)(1) Upon a finding that real property has been taken for the use of the public, the governmental unit may either:

(A) Pay compensation for the reduction in fair market value caused by the regulatory program; or

(B) Invalidate all or part of the regulatory program.

(2) Compensation is required under this section only when the fair market value of the real property is reduced by at least twenty percent (20%).

(3) If a governmental unit elects to pay compensation to the private real property owner under subdivision (c)(1)(A) of this section:

(A) The court that rendered the judgment in the lawsuit or the state agency that issued the final order or decision in the case shall withdraw the part of the judgment or final decision or order rescinding the regulatory program;

(B) The governmental unit shall pay to the owner the damages determined in the judgment or final order by the thirtieth day after the date the judgment is rendered or the final decision or order is issued; and

(C) When more than one (1) governmental unit is involved, the court shall determine the proportion each governmental unit shall be required to contribute to the compensation.

(d) When a regulatory program resulting from a zoning ordinance operates to change a permitted use and the fair market value of the affected real property is the same or greater than the fair market value was before the effective date of the implementation of the regulatory program, compensation shall not be paid under this subchapter.

(e) This subchapter does not apply to:

(1) An owner of real property if the real property is not the direct subject of the regulatory program;

(2) Laws or rules within the jurisdiction of the State Health Officer or regulatory activities of the Arkansas Pollution Control and Ecology Commission, the Arkansas Department of Environmental Quality, the Arkansas Livestock and Poultry Commission, the Arkansas Public Service Commission, or the State Plant Board under delegated or authorized programs or approved plans under federal law;

(3) An eminent domain proceeding to which the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601 et seq., as in effect on January 1, 2015, applies;

(4) An eminent domain proceeding undertaken by a governmental unit under applicable law;

(5) A lawful forfeiture or seizure of contraband under Arkansas Code, Title 5;

(6) A lawful seizure of property as evidence of a crime or violation of law;

(7) An action, including an action of a governmental unit, that is reasonably taken to fulfill an obligation mandated by federal law or an action of a governmental unit that is reasonably taken to fulfill an obligation mandated by state law;

(8) The discontinuance or modification of a program or regulation that provides a unilateral expectation that does not rise to the level of a recognized interest in private real property;

(9) An action taken to prohibit or restrict a condition or use of private real property if the governmental entity reasonably determines that the condition or use constitutes a public or private nuisance as determined by background principles of nuisance and property law of this state;

(10) An action taken out of a reasonable good faith belief that the action is necessary to prevent an immediate threat to life or property;

(11) A rule, regulation, or proclamation adopted for the purpose of regulating water safety, hunting, fishing, or control of nonindigenous or exotic aquatic resources;

(12) An action taken by a governmental unit:

(A) To regulate construction in an area designated under law as a floodplain;

(B) To regulate onsite sewage facilities;

(C) To prevent waste of or protect rights of owners of interest in groundwater;

(D) To prevent subsidence; or

(E) Under its police power to make laws and regulations for the benefit of its communities;

(13) The appraisal of property for purposes of ad valorem taxation;

(14) An action that is taken in response to a threat to public health and safety that is designed to advance the health and safety purpose; or

(15) An action by a municipality unless the regulatory program has effect in the territorial jurisdiction of the municipality, excluding annexation, and that enacts or enforces a regulatory program that does not impose identical requirements or restrictions in the entire territorial jurisdiction of the municipality.

History. Acts 2015, No. 1002, § 2.

18-15-1704. Statute of limitations.

(a)(1) A lawsuit under this subchapter shall be filed by the one-hundred-eightieth day after the date the private real property owner knew or should have known that the regulatory program restricted or limited the owner's right in the private real property.

(2) The statute of limitations begins upon the final administrative decision implementing the regulatory program affecting the owner's or user's property.

(b) A program is implemented with respect to an owner's or user's property when actually applied to that property.

History. Acts 2015, No. 1002, § 2.

18-15-1705. Cumulative remedies.

(a) The remedies provided under this subchapter are not exclusive and are in addition to other procedures or remedies provided by law.

(b) A person shall not recover under this subchapter and also recover under another law or in an action at common law for the same economic loss.

History. Acts 2015, No. 1002, § 2.

18-15-1706. Appeals.

An appeal from the final judgment of the cause of action in § 18-15-1703 may be taken according to law.

History. Acts 2015, No. 1002, § 2.

CHAPTER 16

LANDLORD AND TENANT

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. ACTIONS AGAINST TENANTS.
3. SECURITY DEPOSITS.
4. SELF-SERVICE STORAGE FACILITIES.
5. TENANT LIABILITY — EVICTION.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 18-16-101. Failure to pay rent — Refusal to vacate upon notice — Penalty.
- 18-16-102, 18-16-103. [Repealed.]
- 18-16-104. [Repealed.]
- 18-16-105. Termination of oral lease of farmlands.
- 18-16-106, 18-16-107. [Repealed.]
- 18-16-108. Property left on premises after termination of lease.
- 18-16-109. [Transferred.]

SECTION.

- 18-16-110. Landlord's liability arising from alleged defects or disrepair of premises.
- 18-16-111. Manufactured homes and mobile homes on leased land — Definitions.
- 18-16-112. Protection for victims of domestic abuse — Definitions.
- 18-16-113. Hunting and fishing rights — Leased farmland.

Cross References. Contracts for lease of lands or tenements for more than one year must be written, § 4-59-101.

Effective Dates. Acts 1901, No. 122, § 2: effective on passage.

Acts 2009, No. 815, § 3: Apr. 3, 2009. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the traditional deadline for notice of the termination of a lease for the next crop year is June 30; that farmers operating under an oral lease are currently vulnerable to a demand for the surrender of their land; that the certainty of a farm lease of lands is necessary before the purchase of seed, fertilizer, equipment replacement, deter-

mination of the amount of a production loan, and advanced planning required for farming operations; and that this act will provide the necessary certainty to permit efficient farming operations. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

RESEARCH REFERENCES

ALR. Willfulness or malice justifying landlord's collection of statutory multiple damages for tenant's wrongful retention of possession. 7 A.L.R.4th 589.

Life tenant's death affecting rights under lease given. 14 A.L.R.4th 1054.

Provision in lease prohibiting assignment or subletting of leased premises without lessor's consent. 21 A.L.R.4th 188.

Merger or consolidation of corporate lessee as breach of clause in lease prohibiting, conditioning, or restricting assign-

ment or sublease. 39 A.L.R.4th 879.

Lessor's retention of past-due rental payments as precluding termination of lease and dispossession of lessee for non-payment of rent. 39 A.L.R.4th 1204.

Death of lessee as terminating lease. 42 A.L.R.4th 963.

Am. Jur. 49 Am. Jur. 2d, L & T, § 273 et seq. and § 546 et seq.

Ark. L. Rev. Recent Development: Landlord Tenant, 58 Ark. L. Rev. 753.

C.J.S. 52 C.J.S., L & T, § 238 et seq.

18-16-101. Failure to pay rent — Refusal to vacate upon notice — Penalty.

(a) Any person who shall rent any dwelling house or other building or any land situated in the State of Arkansas and who shall refuse or fail to pay the rent therefor when due according to contract shall at once forfeit all right to longer occupy the dwelling house or other building or land.

(b)(1) If, after ten (10) days' notice in writing shall have been given by the landlord or the landlord's agent or attorney to the tenant to vacate the dwelling house or other building or land, the tenant shall willfully refuse to vacate and surrender the possession of the premises to the landlord or the landlord's agent or attorney, the tenant shall be guilty of a misdemeanor.

(2) Upon conviction before any justice of the peace or other court of competent jurisdiction in the county where the premises are situated, the tenant shall be fined twenty-five dollars (\$25.00) per day for each day that the tenant fails to vacate the premises.

(c)(1) Any tenant charged with refusal to vacate upon notice who enters a plea of not guilty to the charge of refusal to vacate upon notice and who continues to inhabit the premises after notice to vacate pursuant to subsection (b) of this section shall be required to deposit into the registry of the court a sum equal to the amount of rent due on the premises. The rental payments shall continue to be paid into the registry of the court during the pendency of the proceedings in accordance with the rental agreement between the landlord and the tenant, whether the agreement is written or oral.

(2)(A) If the tenant is found not guilty of refusal to vacate upon notice, the rental payments shall be returned to the tenant.

(B) If the tenant is found guilty of refusal to vacate upon notice, the rental payment paid into the registry of the court shall be paid over to the landlord by the court clerk.

(3) Any tenant who pleads guilty or nolo contendere to or is found guilty of refusal to vacate upon notice and has not paid the required

rental payments into the registry of the court shall be guilty of a Class B misdemeanor.

History. Acts 1901, No. 122, § 1, p. 193; C. & M. Dig., § 6569; Acts 1937, No. 129, § 1; Pope's Dig., § 8599; A.S.A. 1947, § 50-523; Acts 2001, No. 1733, § 1.

Cross References. Fines, § 5-4-201. Imprisonment, § 5-4-401.

RESEARCH REFERENCES

Ark. L. Notes. Goforth, Arkansas Code § 18-16-101: A Challenge to the Constitutionality and Desirability of Arkansas' Criminal Eviction Statute, 2003 Arkansas L. Notes 21.

Prettyman, The Landlord Protection Act, Arkansas Code § 18-17-101 et seq., 2008 Ark. L. Notes 71.

U. Ark. Little Rock L.J. Survey of Arkansas Law, Property, 1 U. Ark. Little Rock L.J. 223.

Survey, Miscellaneous — Property, 13 U. Ark. Little Rock L.J. 386.

U. Ark. Little Rock L. Rev. Survey of

Legislation, 2001 Arkansas General Assembly, Property Law, 24 U. Ark. Little Rock L. Rev. 549.

Non-Legislative Commission on the Study of Landlord-Tenant Laws: Report to Governor Mike Beebe, President Pro Tempore of the Senate, and Speaker of the House December 31, 2012, 35 U. Ark. Little Rock L. Rev. 739 (2013).

Lynn Foster, The Hands of the State: The Failure to Vacate Statute and Residential Tenants' Rights In Arkansas, 36 U. Ark. Little Rock L. Rev. 1 (2013).

CASE NOTES

ANALYSIS

Constitutionality.
Criminal Trespass.
Evidence.
Injunction.
Jury Instructions.
Notice.
Parties.
Sentence.

Constitutionality.

This section does not deprive a defendant of rights under the due process clause of the Fourteenth Amendment to the United States Constitution, but is a valid exercise of the police power of the state. *Poole v. State*, 244 Ark. 1222, 428 S.W.2d 628 (1968); *Duhon v. State*, 299 Ark. 503, 744 S.W.2d 830 (1989).

Although landlords could use this section to evict tenants thus avoiding the use of civil processes which afford the tenant prior notice and hearing, the state was acting within its constitutional authority in providing criminal penalties for tenants who fail to pay rent so long as the federal rights of the tenants are protected by the state courts. *Munson v. Gilliam*, 543 F.2d 48 (8th Cir. 1976); *Duhon v. State*, 299 Ark. 503, 744 S.W.2d 830 (1989).

Criminal Trespass.

The criminal trespass statute, § 5-39-203, does not apply to a case where a renter, who is served with a valid notice to quit based upon failure to pay rent, refuses to vacate the premises, in view of the more specific statutes regulating a tenant's unlawful detainer, § 18-60-304 and this section. *Williams v. City of Pine Bluff*, 284 Ark. 551, 683 S.W.2d 923 (1985).

Evidence.

Defendant was guilty of violating this section where written lease agreement contained no term and was a tenancy at will, and when landlord demanded he vacate or pay rent, he did neither. *Polk v. State*, 28 Ark. App. 282, 772 S.W.2d 368 (1989).

Injunction.

The possibility of criminal prosecution under this section was not per se irreparable injury, so that tenants were not entitled to a preliminary injunction against prosecution for failure to pay rent. *Munson v. Gilliam*, 543 F.2d 48 (8th Cir. 1976).

In the absence of intentional conduct motivated by a malicious or discriminatory purpose, evidence of bad faith was

insufficient to justify a preliminary injunction against prosecution under this section. *Munson v. Gilliam*, 543 F.2d 48 (8th Cir. 1976).

Jury Instructions.

Trial court did not abuse its discretion in giving jury instructions on the unlawful detainer statute and the criminal possession of real property statute because the instructions were correct statements of the law since they tracked the statutory language of § 18-60-304(2) and subsection (a) and subdivision (b)(1) of this section; there was some basis in the evidence to give the instructions because the lawfulness of the respective parties' legal right to possess real property bore on the issue of punitive damages, and the evidence did not demonstrate that an unlawful detainer action or misdemeanor charges were ever filed, but it was evident that there could have been grounds for such civil or criminal proceedings given the evidence adduced at trial. *Schmidt v. Stearman*, 2010 Ark. App. 274, 374 S.W.3d 254 (2010).

Notice.

Thirty days after service of notice to vacate constituted a reasonable period in

which to vacate for a tenancy at will, and tenant became a trespasser at the end of 30 days after such notice. *Polk v. State*, 28 Ark. App. 282, 772 S.W.2d 368 (1989).

Parties.

Where the two owners of undivided interests in land contracted with a third party, also owner of an undivided interest, to lease lands to the third party, one owner-lessor could not procure a cancellation of the lease for failure to pay rent by the third party without joining the other owner-lessor in the proceeding. *La Fargue v. La Fargue*, 210 Ark. 97, 194 S.W.2d 438 (1946).

Sentence.

Court erred in imposing a sentence of 30 days' imprisonment for a violation of this section as the offense is classified as a violation and is subject to punishment only in accordance with the limitations of this section. *Duhon v. State*, 299 Ark. 503, 744 S.W.2d 830 (1989).

Cited: *Parker v. Brush*, 276 Ark. 437, 637 S.W.2d 539 (1982); *Breshears v. State*, 94 Ark. App. 192, 228 S.W.3d 508 (2006).

18-16-102, 18-16-103. [Repealed.]

Publisher's Notes. These sections, concerning lessee unlawfully collecting from subtenant, penalty and rent collection by personal representative of life tenant, were repealed by Acts 2007, No. 1004, §§ 2, 3. The sections were derived from the following sources:

18-16-102. Acts 1883, No. 21, § 1, p. 32; 1893, No. 131, § 1, p. 228; C. & M. Dig., §§ 6894-6896; Pope's Dig., §§ 8850-8852; A.S.A. 1947, §§ 50-521, 50-522.

18-16-103. Rev. Stat., ch. 88, § 1; C. & M. Dig., § 6549; Pope's Dig., § 8579; A.S.A. 1947, § 50-501.

18-16-104. [Repealed.]

Publisher's Notes. This section, concerning the penalty for enticing a renter away, was repealed by Acts 2005, No. 1994, § 560. The section was derived from Acts 1883, No. 96, § 8, p. 176; 1905, No.

298, § 1, p. 726; C. & M. Dig., § 6570; Acts 1923 (1st. Ex. Sess.), No. 34, § 1; Pope's Dig., § 8600; A.S.A. 1947, § 50-524.

18-16-105. Termination of oral lease of farmlands.

The owner of farmlands that are rented or leased under an oral rental or lease agreement may elect not to renew the oral rental or lease agreement for the following calendar year by giving written notice by certified mail to the renter or lessee on or before June 30 that the oral

rental or lease agreement will not be renewed for the following calendar year.

History. Acts 2009, No. 190, § 1; 2009, No. 815, §§ 1, 2.

Publisher's Notes. Former § 18-16-105, concerning termination of oral lease

of farmlands, was repealed by Acts 2007, No. 1004, § 4. The section was derived from the following sources: Acts 1981, No. 866, § 1; A.S.A. 1947, § 50-531.

18-16-106, 18-16-107. [Repealed.]

Publisher's Notes. These sections, concerning holding over after termination of term, and failure to quit after notice of intention, were repealed by Acts 2007, No. 1004, §§ 5-6. The sections were derived from the following sources:

18-16-106. Rev. Stat., ch. 88, §§ 9, 10; C.

& M. Dig., §§ 6557, 6558; Pope's Dig., §§ 8587, 8588; A.S.A. 1947, §§ 50-509, 50-510.

18-16-107. Rev. Stat., ch. 88, §§ 7, 8; C. & M. Dig., §§ 6555, 6556; Pope's Dig., §§ 8585, 8586; A.S.A. 1947, §§ 50-507, 50-508.

18-16-108. Property left on premises after termination of lease.

(a) Upon the voluntary or involuntary termination of any lease agreement, all property left in and about the premises by the lessee shall be considered abandoned and may be disposed of by the lessor as the lessor shall see fit without recourse by the lessee.

(b) All property placed on the premises by the tenant or lessee is subject to a lien in favor of the lessor for the payment of all sums agreed to be paid by the lessee.

History. Acts 1987, No. 577, § 2.

Cross References. Landlord's liens, § 18-41-101 et seq.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey — Property, 10 U. Ark. Little Rock L.J. 605.

CASE NOTES

ANALYSIS

In General.
Applicability.
Abandoned Property.
Legislative Intent.
Priority of Lien.

In General.

Prior to the enactment of this section, the only landlord's lien recognized in Arkansas, either by statute or common law, pertained to crops. *Herringer v. Mercantile Bank*, 315 Ark. 218, 866 S.W.2d 390 (1993).

The use of the word "shall" in the stat-

ute is mandatory and requires that property left in and about leased premises be considered abandoned and subject to whatever disposition made by the landlord. *Harris v. Whipple*, 63 Ark. App. 84, 974 S.W.2d 482 (1998).

Where a tenant moved her family and most of their belongings from a leased trailer, without notice to the landlord any items left in the trailer were deemed to be abandoned. *Harris v. Whipple*, 63 Ark. App. 84, 974 S.W.2d 482 (1998).

Applicability.

Finding against the appellant property owner in his conversion claim was im-

proper, in part because there was no finding that appellant abandoned his personality. Section 18-16-108 was inapplicable because, even if an oral lease existed, the appellee property owner was not a "lessor" whom the statute permitted to dispose of a tenant's property; if there was a lessor, it was appellee's son, and there was no evidence that, in taking dominion over the personality, appellee was acting on his son's behalf. *Schmidt v. Stearman*, 98 Ark. App. 167, 253 S.W.3d 35 (2007).

Abandoned Property.

Trial court did not err in finding that appellant abandoned the property it left on premises after being afforded ample opportunity to accomplish its removal; with the termination of appellant's right as a lessee in a tenancy at will to remain on the property after the trial court ordered the issuance of a writ of possession, any property left behind was abandoned. *Omni Holding & Dev. Corp. v. C.A.G. Invs., Inc.*, 370 Ark. 220, 258 S.W.3d 374 (2007).

Legislative Intent.

When the legislature adopted the landlord's lien in 1987, it was mindful of this state's longstanding aversion to a landlord's lien and of the strict construction that would be applied to such legislation, and was also aware of the law and policies

embodied in the U.C.C.; the legislature never intended a landlord's lien which arose simultaneously with a purchase money security interest (see §§ 4-9-103 and 4-9-324) to have priority. *Herringer v. Mercantile Bank*, 315 Ark. 218, 866 S.W.2d 390 (1993).

Priority of Lien.

The Uniform Commercial Code specifically excludes landlord's liens. *Herringer v. Mercantile Bank*, 315 Ark. 218, 866 S.W.2d 390 (1993).

There is no mechanism under this section for filing a landlord's lien that would approximate the perfection requirement under the U.C.C.; therefore, under Arkansas law, the priority of a landlord's lien is dependent on the time of attachment. *Herringer v. Mercantile Bank*, 315 Ark. 218, 866 S.W.2d 390 (1993).

While a landlord's lien under this section is not a security interest under the U.C.C., and therefore not a "conflicting security interest" under § 4-9-322, the landlord's lien operates, in effect, as a floating lien on after-acquired property (see § 4-9-204); it was exactly this kind of lien for which § 4-9-322 was structured, in order to protect the purchase money lien creditor. *Herringer v. Mercantile Bank*, 315 Ark. 218, 866 S.W.2d 390 (1993).

18-16-109. [Transferred.]

A.C.R.C. Notes. This section has been renumbered as § 18-28-101.

18-16-110. Landlord's liability arising from alleged defects or disrepair of premises.

No landlord or agent or employee of a landlord shall be liable to a tenant or a tenant's licensee or invitee for death, personal injury, or property damage proximately caused by any defect or disrepair on the premises absent the landlord's:

- (1) Agreement supported by consideration or assumption by conduct of a duty to undertake an obligation to maintain or repair the leased premises; and
- (2) Failure to perform the agreement or assumed duty in a reasonable manner.

History. Acts 2005, No. 928, § 2.

A.C.R.C. Notes. Acts 2005, No. 928, § 1 provided: "(a) The General Assembly finds that the Arkansas Supreme Court

has requested its guidance regarding the law pertaining to a landlord's liability to tenants and tenants' licensees and invitees for death, injuries, or property dam-

age suffered on the leased premises that are proximately caused by defects or disrepair on the premises.

“(b) As the Supreme Court recognized in *Thomas v. Stewart*, 347 Ark. 33, 60 S.W.3d 415 (2001) and *Probst v. McNeill*, 326 Ark. 623, 932 S.W.2d 766 (1996), for more than a century, Arkansas law has adhered to the common law principle under which a landlord has no liability to a tenant or tenant’s guests absent the landlord’s:

“(1) Agreement supported by consideration or assumption by conduct of a duty

to undertake repair and maintenance; and

“(2) Failure to perform the agreement or assumed duty in a reasonable manner.

“(c)(1) The General Assembly further finds that the Supreme Court has properly and correctly interpreted and applied the law and that existing law should not be altered or extended.

“(2) The purpose and intent of Section 2 of this act is to codify this rule of law as it exists under Arkansas common law.”

RESEARCH REFERENCES

Ark. L. Notes. Prettyman, The Landlord Protection Act, Arkansas Code § 18-17-101 et seq., 2008 Ark. L. Notes 71.

Ark. L. Rev. Comment, Is Home Where Arkansas’s Heart Is?: State Adopts Unique Statutory Approach to Landlord Tort Liability and Maintains Common Law “Caveat Lessee,” 59 Ark. L. Rev. 737.

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General Assembly, Property Law, 28 U. Ark. Little Rock L. Rev. 385.

Jerald Clifford McKinney, II, Caveat Who?: A Review of the Landlord/Tenant Relationship in the Context of Injuries and Maintenance Obligations, 35 U. Ark. Little Rock L. Rev. 1049 (2013).

Lynn Foster, The Hands of the State: The Failure to Vacate Statute and Residential Tenants’ Rights In Arkansas, 36 U. Ark. Little Rock L. Rev. 1 (2013).

18-16-111. Manufactured homes and mobile homes on leased land — Definitions.

(a) As used in this section:

(1) “Lessee” means the person or persons leasing the property, site, or lot where a manufactured home or mobile home is located;

(2) “Lessor” means the owner or manager of the property, site, or lot where a manufactured home or mobile home is located; and

(3) “Unoccupied” means that a manufactured home or mobile home has ceased to be a customary place of habitation or abode and no person is living or residing in it.

(b)(1) When a manufactured home or mobile home on a leased site is unoccupied and the lease or rental payment for the leased site where the mobile home or manufactured home is located is sixty (60) days or more past due, the lessor shall notify the lessee and the lienholder, if the lienholder is not the lessee or occupant of the manufactured home or mobile home, that the manufactured home or mobile home is unoccupied and that the lease or rental payment is past due.

(2) The notice shall be in writing and delivered by certified mail and shall include the following information if known or readily available to the lessor:

(A) The lessor’s name and mailing address;

(B) The lessee’s name and last known mailing address;

- (C) The lienholder's name and mailing address;
- (D) The street address or physical location of the manufactured home or mobile home;
- (E) The monthly lease payment amount;
- (F) The serial number of the manufactured home or mobile home; and
- (G) A description of the manufactured home or mobile home, including the make, model, year, dimensions, and any identification numbers or marks.

(3) In the notice required in subdivision (b)(1) of this section, the lessor shall notify the lienholder that unless the manufactured home or mobile home is removed from the leased site within thirty (30) days from the date the lienholder receives the notice, the manufactured home or mobile home shall be subject to a lien in favor of the lessor for the payment of all lease or rental payments accruing from the date the lienholder received the notice.

(c)(1) Unless the lienholder is prevented by law from removing the manufactured home or mobile home, the lienholder has thirty (30) days to remove the manufactured home or mobile home before the lienholder shall be held responsible for lease or rental payments accruing from the date the lienholder received the notice.

(2) If the lienholder fails to remove the manufactured home or mobile home within thirty (30) days, the manufactured home or mobile home shall be subject to a lien in favor of the lessor for the payment of all lease or rental payments beginning on the date that the notice is received by the lienholder in an amount equal to the monthly lease or rental payments contained in the notice.

(d) Nothing in this section shall obligate the lienholder for any lease or rental payments owed while the lessee occupied the manufactured home or mobile home or any other lease or rental payments due prior to the notification of the lienholder, as required by subsection (b) of this section.

(e) Nothing in this section shall prevent the lessor from holding the lessee responsible for any unpaid lease or rental payments.

History. Acts 2005, No. 2228, § 1.

18-16-112. Protection for victims of domestic abuse — Definitions.

(a) As used in this section:

(1) "Documented incident of domestic abuse" means evidence of domestic abuse contained in an order of a court of competent jurisdiction;

(2) "Domestic abuse" means:

(A) The infliction of physical injury or the creation of a reasonable fear that physical injury or harm will be inflicted upon a member of a household by a member or former member of the household; or

(B) The commission of a sex crime or act of stalking upon a member of a household;

(3) "Domestic abuse offender" means a person identified in a documented incident of domestic abuse as performing any act of domestic abuse;

(4) "Sex crime" includes without limitation:

(A) The following offenses:

(i) Rape, § 5-14-103;

(ii) Sexual indecency with a child, § 5-14-110;

(iii) Sexual assault in the first degree, § 5-14-124;

(iv) Sexual assault in the second degree, § 5-14-125;

(v) Sexual assault in the third degree, § 5-14-126;

(vi) Sexual assault in the fourth degree, § 5-14-127;

(vii) Incest, § 5-26-202;

(viii) Engaging children in sexually explicit conduct for use in visual or print medium, § 5-27-303;

(ix) Transportation of minors for prohibited sexual conduct, § 5-27-305;

(x) Employing or consenting to the use of a child in a sexual performance, § 5-27-402;

(xi) Pandering or possessing visual or print medium depicting sexually explicit conduct involving a child, § 5-27-304;

(xii) Producing, directing, or promoting a sexual performance by a child, § 5-27-403;

(xiii) Promoting prostitution in the first degree, § 5-70-104;

(xiv) Indecent exposure, § 5-14-112, if a felony level offense;

(xv) Exposing another person to human immunodeficiency virus when a person who has tested positive for human immunodeficiency virus was ordered by the sentencing court to register as a sex offender, § 5-14-123;

(xvi) Kidnapping pursuant to § 5-11-102(a) when the victim is a minor and the offender is not the parent of the victim;

(xvii) False imprisonment in the first degree and false imprisonment in the second degree, §§ 5-11-103 and 5-11-104, when the victim is a minor and the offender is not the parent of the victim;

(xviii) Permitting abuse of a minor pursuant to § 5-27-221;

(xix) Computer child pornography, § 5-27-603;

(xx) Computer exploitation of a child, § 5-27-605;

(xxi) Permanent detention or restraint when the offender is not the parent of the victim, § 5-11-106; and

(xxii) Distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child, § 5-27-602;

(B) An attempt, solicitation, or conspiracy to commit any offense enumerated in subdivision (a)(4)(A) of this section; and

(C) An adjudication of guilt for an offense of the law of another state, for a federal offense, for a tribal court offense, or for a military offense:

(i) That is similar to any offense enumerated in subdivision (a)(4)(A) of this section; or

(ii) When that adjudication of guilt requires registration under another state's sex offender registration laws;

(5) "Stalking" means following or loitering near a person with the purpose of annoying, harassing, or committing an assault or battery against the person; and

(6) "Victim of domestic abuse" means a person or a member of the person's household who is identified in a documented incident of domestic abuse within:

(A) The immediately preceding sixty (60) days; or

(B) Sixty (60) days of the termination of a residential tenancy by the person, a member of the person's household, or landlord because of domestic abuse.

(b) If a residential tenant, an applicant for a residential tenancy, or a member of the tenant or applicant's household is a victim of domestic abuse as evidenced by a documented incident of domestic abuse:

(1) With respect to the victim of domestic abuse, a landlord shall not terminate or fail to renew a residential tenancy, refuse to enter into a residential tenancy, or otherwise retaliate in the leasing of a residence because of the domestic abuse; and

(2)(A) At the residential tenant's expense and with the landlord's prior consent, a landlord or a residential tenant other than a domestic abuse offender may change the locks to the residential tenant's residence.

(B) The landlord or residential tenant shall furnish the other a copy of the new key to the residential tenant's residence immediately after changing the locks or as soon after changing the locks as possible if either the landlord or residential tenant is unavailable.

(c) Notwithstanding a conflicting provision in a domestic abuse offender's residential tenancy agreement, if a domestic abuse offender is under a court order to stay away from a co-tenant residing in the domestic abuser's offender's residence or the co-tenant's residence:

(1) The domestic abuse offender under the court order may access either residence only to the extent permitted by the court order or another court order;

(2) A landlord may refuse access by a domestic abuse offender to the residence of a victim of domestic abuse unless the domestic offender is permitted access by court order; and

(3) A landlord may pursue all available legal remedies against the domestic abuse offender, including without limitation an action:

(A) To terminate the residential tenancy agreement of the domestic abuse offender;

(B) To evict the domestic abuse offender whether or not a residential tenancy agreement between the landlord and domestic abuse offender exists; and

(C) For damages against the domestic abuse offender:

(i) For any unpaid rent owed by the domestic abuse offender; and

(ii) Resulting from a documented incident of domestic abuse.

(d) A landlord is entitled to a court order terminating the residential tenancy agreement of a person or evicting a person, or both, under

subdivision (c)(3)(A) or (c)(3)(B) of this section upon proof that the person is a domestic abuse offender under this section.

(e) A landlord is immune from civil liability if the landlord in good faith:

(1) Changes the locks under subdivision (b)(2) of this section; or

(2) Acts in accordance with a court order under subsection (c) of this section.

(f) A residential tenant may not waive in a residential tenancy the residential tenant's right to request law enforcement assistance or other emergency assistance.

History. Acts 2007, No. 682, § 1; 2009, No. 482, § 1.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Non-Legislative Commission on the Study of Landlord-Tenant Laws: Report to Governor Mike Beebe, President Pro Tempore of the

Senate, and Speaker of the House December 31, 2012, 35 U. Ark. Little Rock L. Rev. 739 (2013).

18-16-113. Hunting and fishing rights — Leased farmland.

(a)(1) A tenant of leased or rented farmland shall have no right to hunt or fish or grant the right to hunt or fish on the farmland that he or she leases or rents unless the right to hunt or fish or to grant the right to hunt or fish is expressly granted in writing by the owner of the farmland.

(2) The right to hunt or fish or to grant the right to hunt or fish on farmland shall reside solely with the owner of the farmland.

(b) The farmland owner's right to hunt or fish on his or her farmland includes without limitation the right to:

(1) Travel by foot or by any type of vehicle or boat, and by any means on, over, across, and through the farmland, and by any roads, waterways, ditches, levies, rights of way, or easements on or appurtenant to the farmland;

(2) Move, remove, use, pump, or impound water on, upon, and about the farmland;

(3) Erect, maintain, and operate permanent or temporary structures, facilities, utilities, pumping systems, blinds, docks, decks, and other similar structures and facilities on the farmland; and

(4) Grant other persons, natural or artificial, the right, concurrently or exclusively, to engage in and undertake any manner or means of hunting or fishing on, upon, and about the farmland that is leased or rented, whether orally or in writing, and to exercise any and all of the foregoing rights attendant thereto.

History. Acts 2011, No. 869, § 1.

SUBCHAPTER 2 — ACTIONS AGAINST TENANTS

SECTION.

18-16-201 — 18-16-205. [Repealed.]

18-16-201 — 18-16-205. [Repealed.]

Publisher's Notes. These sections, concerning ejectment for nonpayment of rent, duty of tenant to notify landlord, actions for use and occupation, remedy when lease for life, and recovery of rent in arrears due decedent, were repealed by Acts 2007, No. 1004, §§ 7-11. The sections were derived from the following sources:

18-16-201. Rev. Stat., ch. 88, §§ 15-21; C. & M. Dig., §§ 6562-6568; Pope's Dig., §§ 8592-8598; A.S.A. 1947, §§ 50-514 – 50-520.

18-16-202. Rev. Stat., ch. 88, § 6; C. &

M. Dig., § 6554; Pope's Dig., § 8584; A.S.A. 1947, § 50-506.

18-16-203. Rev. Stat., ch. 88, §§ 11-13; C. & M. Dig., §§ 6559-6561; Pope's Dig., §§ 8589-8591; A.S.A. 1947, §§ 50-511 – 50-513.

18-16-204. Rev. Stat., ch. 88, § 4; C. & M. Dig., § 6552; Pope's Dig., § 8582; A.S.A. 1947, § 50-504.

18-16-205. Rev. Stat., ch. 88, §§ 2, 3, 5; C. & M. Dig., §§ 6550, 6551, 6553; Pope's Dig., §§ 8580, 8581, 8583; A.S.A. 1947, §§ 50-502, 50-503, 50-505.

SUBCHAPTER 3 — SECURITY DEPOSITS

SECTION.

18-16-301. Definitions.

18-16-302. Transferee, etc., bound.

18-16-303. Exemptions.

18-16-304. Maximum amount.

SECTION.

18-16-305. Refund required — Exceptions.

18-16-306. Remedies.

RESEARCH REFERENCES

Am. Jur. 49 Am. Jur. 2d, L & T, § 105 et seq.

C.J.S. 52A C.J.S., L & T, § 1092 et seq.

U. Ark. Little Rock L.J. DeSimone, Survey of Property Law, 3 U. Ark. Little Rock L.J. 286.

18-16-301. Definitions.

As used in this subchapter:

(1) "Dwelling unit" means a structure or the part of the structure that is used as a home, residence, or sleeping place by one (1) person who maintains a household or by two (2) or more persons who maintain a common household;

(2) "Landlord" means the owner, lessor, or sublessor of the dwelling unit or the building of which it is a part;

(3) "Owner" means one (1) or more persons, jointly or severally, in whom is vested:

(A) All or part of the legal title to property; or

(B) All or part of the beneficial ownership and a right to present use and enjoyment of the premises. The term includes a mortgagor in possession;

(4) "Person" means any individual, firm, partnership, corporation, association, or other organization;

(5) "Premises" means a dwelling unit and the structure of which it is a part and facilities and appurtenances therein and grounds, areas, and facilities held out for the use of tenants generally or whose use is promised to the tenant;

(6) "Rent" means all payments to be made to the landlord under the rental agreement;

(7) "Rental agreement" means all written or oral agreements and valid rules and regulations embodying the terms and conditions concerning the use and occupancy of a dwelling unit and premises; and

(8) "Tenant" means a person entitled under a rental agreement to occupy a dwelling unit to the exclusion of others.

History. Acts 1979, No. 531, § 1; A.S.A. 1947, § 50-525.

18-16-302. Transferee, etc., bound.

The transferee, assignee, or other holder of the landlord's interest in the premises at the time of the termination of the tenancy is bound by this subchapter.

History. Acts 1979, No. 531, § 5; A.S.A. 1947, § 50-529.

18-16-303. Exemptions.

(a) This subchapter shall not apply to dwelling units owned by an individual, if the individual, his or her spouse and minor children, and any and all partnerships, corporations, or other legal entities formed for the purpose of renting dwelling units and of which they are officers, owners, or majority shareholders own, or collectively own, five (5) or fewer dwelling units.

(b) This exemption does not apply to units for which management, including rent collection, is performed by third persons for a fee.

History. Acts 1979, No. 531, § 6; A.S.A. 1947, § 50-530.

18-16-304. Maximum amount.

A landlord may not demand or receive a security deposit, however denominated, in an amount or value in excess of two (2) months periodic rent.

History. Acts 1979, No. 531, § 2; A.S.A. 1947, § 50-526.

18-16-305. Refund required — Exceptions.

(a)(1) Within sixty (60) days of termination of the tenancy, property or money held by the landlord as security shall be returned to the tenant.

(2) However, the money may be applied to the payment of accrued unpaid rent and any damages which the landlord has suffered by reason of the tenant's noncompliance with the rental agreement, all as itemized by the landlord in a written notice delivered to the tenant, together with the remainder of the amount due sixty (60) days after termination of the tenancy and delivery of possession by the tenant.

(b)(1) The landlord shall be deemed to have complied with subsection (a) of this section by mailing via first class mail the written notice and any payment required to the last known address of the tenant.

(2) If the letter containing the payment is returned to the landlord and if the landlord is unable to locate the tenant after reasonable effort, then the payment shall become the property of the landlord one hundred eighty (180) days from the date the payment was mailed.

History. Acts 1979, No. 531, § 3; A.S.A. 1947, § 50-527; Acts 2009, No. 559, § 1.

18-16-306. Remedies.

(a)(1) If the landlord fails to comply with this subchapter, the tenant may recover:

(A) The property and money due him or her;

(B) Damages in an amount equal to two (2) times the amount wrongfully withheld;

(C) Costs; and

(D) Reasonable attorney's fees.

(2) However, the landlord shall be liable only for costs and the sum erroneously withheld if the landlord shows by the preponderance of the evidence that his or her noncompliance:

(A) Resulted from an error which occurred despite the existence of procedures reasonably designed to avoid such errors; or

(B) Was based on a good faith dispute as to the amount due.

(b) This section does not preclude the landlord or tenant from any other relief to which either may be lawfully entitled.

History. Acts 1979, No. 531, § 4; A.S.A. 1947, § 50-528.

SUBCHAPTER 4 — SELF-SERVICE STORAGE FACILITIES**SECTION.**

18-16-401. Definitions.

18-16-402. Operator's lien on stored property.

18-16-403. Use for residential purposes.

18-16-404. Notice of lien.

SECTION.

18-16-405. Access to leased space — Care of property.

18-16-406. Default — Right to sell or remove property.

18-16-407. Sale and removal procedure.

SECTION.

- 18-16-408. Disposition of sale proceeds.
18-16-409. Notices — Method of delivery.
18-16-410. Limits on value of stored property.

SECTION.

- 18-16-411. Conditions and limitations for imposing late fees.

18-16-401. Definitions.

As used in this subchapter:

- (1) "Default" means the failure to timely perform an obligation of a rental agreement;
- (2) "Electronic mail" means an electronic message, a file, data, or other information that is transmitted:
 - (A) Between two (2) or more computers, computer networks, or electronic terminals; or
 - (B) Within or between computer networks;
- (3) "Electronic mail address" means a destination commonly expressed as a string of characters to which electronic mail may be sent or delivered;
- (4) "Last known address" means the address or electronic mail address provided by the occupant in:
 - (A) The rental agreement; or
 - (B) A subsequent written notice of a change of address;
- (5) "Leased space" means individual storage space at a self-service storage facility that is rented to an occupant under a rental agreement;
- (6) "Net proceeds" means the proceeds from the sale authorized upon a default under this subchapter after deduction for:
 - (A) Expenses incurred by the operator to exercise its rights under this subchapter, including without limitation attorney's fees, auctioneers' fees, postage, and publication costs;
 - (B) The debt owed by the occupant to the operator for leased space; and
 - (C) Charges related to preserving, assembling, advertising, and selling personal property under this subchapter;
- (7) "Occupant" means a person or entity entitled to the use of leased space at a self-service storage facility under a rental agreement;
- (8)(A) "Operator" means:
 - (i) The owner, operator, lessor, or sublessor of a self-service storage facility;
 - (ii) An agent of the owner operator, lessor, or sublessor of a self-service storage facility; or
 - (iii) Any other person authorized to manage a self-service storage facility.
- (B) "Operator" does not include a warehouseman, unless the operator issues a warehouse receipt, bill of lading, or other document of title for storing personal property;
- (9)(A) "Personal property" means movable property not affixed to land.

(B) “Personal property” includes without limitation goods, wares, merchandise, motor vehicles, watercraft, and household items and furnishings;

(10) “Rental agreement” means a written agreement that establishes or modifies the terms, conditions, or rules concerning the use and occupancy of a self-service storage facility; and

(11) “Self-service storage facility” means real property used for renting or leasing leased space in which an occupant stores and removes personal property on a self-service basis.

History. Acts 1987, No. 576, § 1; 2013, No. 364, § 1.

Amendments. The 2013 amendment rewrote the section.

18-16-402. Operator’s lien on stored property.

(a)(1) An operator of a self-service storage facility has a lien on all personal property stored within each leased space for rent, labor, or other charges and for expenses reasonably incurred in its sale or removal from a self-service storage facility under this subchapter.

(2) If the personal property is a motor vehicle, trailer, or watercraft, the lien shall include fees and expenses reasonably incurred by an operator to remove the personal property from a self-service storage facility under this subchapter.

(b) The lien provided for in this section attaches as of the date the personal property is brought to the self-service storage facility and shall be superior to any other lien or security interest except the following:

(1) A lien which is perfected and recorded in Arkansas in the name of the occupant, either in the county of the occupant’s last known address or in the county where the self-service storage facility is located, prior to the date of the rental agreement;

(2) Any tax lien; and

(3) Any lienholder with a perfected security interest in the property.

(c) Nothing in this subchapter shall be construed to prohibit the occupant, operator, lienholder, or any other person or entity claiming an interest in the property stored in the leased space from applying to a court of competent jurisdiction to determine the validity of the lien or its priority.

History. Acts 1987, No. 576, §§ 3, 7; 2015, No. 348, § 1.

Amendments. The 2015 amendment redesignated (a) as (a)(1) and added (a)(2);

in (a)(1), substituted “An” for “The”, inserted “or removal from a self-service storage facility” and substituted “under” for “as provided in”.

18-16-403. Use for residential purposes.

(a) An operator may not knowingly permit a leased space at a self-service storage facility to be used for residential purposes.

(b) An occupant may not use a leased space for residential purposes.

History. Acts 1987, No. 576, § 2.

18-16-404. Notice of lien.

A rental agreement shall contain a statement in bold type advising the occupant:

- (1) Of the existence of the lien; and
- (2) That property stored in the leased space may be sold or removed to satisfy the lien if the occupant is in default.

History. Acts 1987, No. 576, § 3; 2015, No. 348, § 2. substituted “A” for “The” in the introductory language; and inserted “or removed”

Amendments. The 2015 amendment in (2).

18-16-405. Access to leased space — Care of property.

(a) If an occupant is in default, the operator may deny the occupant access to the leased space.

(b)(1) The exclusive care, custody, and control of all personal property stored in the leased self-service storage space remains vested in the occupant unless:

(A) The rental agreement specifically provides otherwise;

(B) A lien sale is conducted by the operator under this subchapter;

or

(C) The personal property is a motor vehicle, trailer, or watercraft that is removed from the self-service storage facility by an operator of a tow vehicle.

(2) Entry of the leased space by the operator for the purpose of complying with this subchapter shall not constitute conversion nor impose any responsibility for the care, custody, and control of any of the personal property stored.

History. Acts 1987, No. 576, §§ 4, 5; 1991, No. 786, § 28; 2015, No. 348, § 3.

A.C.R.C. Notes. Acts 1987, No. 576, § 6, provided: “All rental agreements, entered into before the effective date of this act, which have not been extended or renewed after that date, shall remain valid and may be enforced or terminated in accordance with their terms or as permitted by any other statute or law of this state.”

Publisher’s Notes. Acts 1991, No. 786, § 37, provided: “The enactment and adoption of this Act shall not repeal, expressly or impliedly, the acts passed at the regular

session of the 78th General Assembly. All such acts shall have full effect and, so far as those acts intentionally vary from or conflict with any provision contained in this Act, those acts shall have the effect of subsequent acts and as amending or repealing the appropriate parts of the Arkansas Code of 1987.”

Amendments. The 2015 amendment, in (b)(1), deleted “Unless the rental agreement specifically provides otherwise and until a lien sale under this subchapter” at the beginning, and added “unless” at the end; and added (b)(1)(A)-(C).

18-16-406. Default — Right to sell or remove property.

(a) If the occupant is in default for more than forty-five (45) days, the operator may enforce the lien by selling the personal property stored in the leased space at a public sale for cash.

(b)(1) If the personal property subject to the lien is a motor vehicle, trailer, or watercraft, and the occupant is in default for at least sixty

(60) days, the operator may remove the personal property instead of selling the property under subsection (a) of this section.

(2) If a motor vehicle, trailer, or watercraft is removed by a towing operator, the operator is not liable for the personal property or any damages to the personal property once the towing operator takes possession of the personal property.

History. Acts 1987, No. 576, § 4; 2015, No. 348, § 4.

Amendments. The 2015 amendment inserted “or remove” in the section head-

ing; redesignated the existing language as (a); in (a), deleted “a period of” following “default for” and inserted “personal” preceding “property”; and added (b).

18-16-407. Sale and removal procedure.

(a) Before conducting a sale or removal of personal property under § 18-16-406, the operator shall:

(1)(A) Notify the occupant in writing of the default.

(B) Except as provided in subdivision (a)(1)(D) of this section, notice shall be sent by first class mail with certificate of mailing to the occupant at the occupant’s last known address.

(C) The notice shall include:

(i) A statement that the contents of the occupant’s leased space are subject to the operator’s lien;

(ii) A statement of the operator’s claim, indicating the charges due on the date of the notice, the amount of any additional charges that shall become due before the date of sale, and the date the additional charges shall become due;

(iii) A demand for payment of the charges due within a specified time, not less than fourteen (14) days after the date that the notice is sent;

(iv) A statement that unless the claim is paid within the time stated, the contents of the occupant’s space will be sold at a specified time and place or removed from the self-service storage facility on a specified date;

(v) The name, street address, and telephone number of the operator or his or her designated agent whom the occupant may contact to respond to the notice; and

(vi) Designation of the date, time, and place where the contents will be sold or removed from the self-service storage facility unless the default is remedied before the sale or removal of the personal property.

(D) If an occupant provides an electronic mail address and gives permission to the storage facility to use the electronic mail address as a legal notification for the occupant’s last known address, then the operator may use the electronic mail address to send the notice required by subdivision (a)(1)(C) of this section instead of sending the notice by first class mail with certificate of mailing;

(2) Publish one (1) advertisement in a newspaper of general circulation in the county in which the storage facility is located at least seven (7) days before the sale or removal of personal property; and

(3)(A) Contact the circuit clerk in the county where the personal property is stored to determine the name and address of any holder of liens or security interests in the personal property being sold or removed.

(B)(i) The operator shall notify by first class mail with certificate of mailing each holder of a lien or security interest of the time and place of the proposed sale or removal of the personal property at least ten (10) days before conducting the sale or removing the personal property.

(ii) The operator shall be required to notify the holder of a lien or security interest only if the lien or security interest is filed under the name of the occupant.

(b) At any time before a sale or removal of personal property under this section, the occupant may pay the amount necessary to satisfy the operator's lien and redeem the occupant's personal property.

(c) The sale under this subchapter shall be held at the self-service storage facility where the personal property is stored.

(d) A purchaser in good faith of any personal property sold under this subchapter takes the property free and clear of any rights of:

(1) Persons against whom the lien was valid; and

(2) Other lienholders.

(e) If the operator complies with the provisions of this subchapter, the operator's liability:

(1) To the occupant shall be limited to the net proceeds received from the sale of the personal property; and

(2) To other lienholders shall be limited to the net proceeds received from the sale of any personal property covered by the other liens or the amount owed to such lienholders, whichever is less.

(f) The operator shall retain a copy of all notices and return receipts required by subsection (a) of this section for six (6) months following the date of the lien sale or removal of the personal property from the self-service storage facility.

History. Acts 1987, No. 576, § 4; 2011, No. 189, § 1; 2013, No. 364, § 2; 2015, No. 348, § 5.

Amendments. The 2011 amendment substituted "first class mail with certificate of mailing" for "certified mail, return receipt requested" in (a)(1) and (a)(3)(B)(i); and subdivided former (a)(3)(B) as present (a)(3)(B)(i) and (a)(3)(B)(ii).

The 2013 amendment rewrote (a).

The 2015 amendment inserted "and removal" in the section heading; inserted "or removal of personal property" in the introductory language of (a); inserted similar references to removal of personal property throughout the section; and changed the reference in (a)(1)(B) from "(2)(D)" to "(a)(1)(D)".

18-16-408. Disposition of sale proceeds.

(a) Proceeds from the sale shall be applied to satisfy the lien, and any surplus shall be disbursed as provided in subsection (b) of this section.

(b) If a sale is held under this subchapter, the operator shall:

(1) Satisfy the lien from the proceeds of the sale; and

(2) Hold the balance, if any, for delivery on demand to the occupant or any other recorded lienholders. If demand is not made within two (2) years after the date of the sale, the surplus shall escheat to the county.

History. Acts 1987, No. 576, § 4.

18-16-409. Notices — Method of delivery.

(a) Unless otherwise specifically provided, all notices required by this subchapter shall be sent by first class mail with certificate of mailing.

(b)(1) Notices sent to the operator shall be sent to the self-service storage facility where the occupant's property is stored.

(2) Notices to the occupant shall be sent to the occupant at the occupant's last known address.

(3) Notices shall be deemed delivered when deposited with the United States Postal Service, properly addressed as provided in § 18-16-407(a) with postage prepaid.

History. Acts 1987, No. 576, § 4; 2011, No. 189, § 2. substituted "first class mail with certificate of mailing" for "certified mail, return receipt requested" in (a).

Amendments. The 2011 amendment

18-16-410. Limits on value of stored property.

If the rental agreement contains a specified limit on the value of property allowed to be stored in an occupant's storage space, the operator is not liable for a loss or damages to the property stored in the occupant's storage space that exceeds the specified limit.

History. Acts 2013, No. 364, § 3.

18-16-411. Conditions and limitations for imposing late fees.

(a) If the amount of a late fee and the conditions for imposing a late fee are stated in the rental agreement or in an addendum to the rental agreement, the operator may impose a late fee on the occupant for each month the occupant does not pay rent when due that does not exceed the greater of:

(1) Thirty dollars (\$30.00) per month; or

(2) Twenty percent (20%) of the amount of monthly rent.

(b) Expenses incurred as a result of rent collection or lien enforcement by an operator may be charged to the occupant in addition to the late fees permitted by this section.

History. Acts 2013, No. 364, § 3.

SUBCHAPTER 5 — TENANT LIABILITY — EVICTION

SECTION.

18-16-501. Common nuisance — Criminal offense.

SECTION.

18-16-502. Gambling — Prostitution — Alcohol.

SECTION.

18-16-503. Complaint — Jurisdiction — Definition.

18-16-504. Form of complaint.

18-16-505. Summons — Notice.

18-16-506. Written objection.

SECTION.

18-16-507. Writ of possession — Definition.

18-16-508. Costs and attorney's fees — Damages.

18-16-509. Immunity from civil liability.

Publisher's Notes. A former subchapter 5, concerning tenant liability and eviction, was repealed by Acts 2007, No. 1004, § 12. The subchapter was derived from the following sources:

18-16-501. Acts 2001, No. 1758, § 1.

18-16-502. Acts 2001, No. 1758, § 2.

18-16-503. Acts 2001, No. 1758, § 3.

18-16-504. Acts 2001, No. 1758, § 4.

18-16-505. Acts 2001, No. 1758, § 5.

18-16-506. Acts 2001, No. 1758, § 6.

18-16-507. Acts 2001, No. 1758, § 7.

18-16-508. Acts 2001, No. 1758, § 8.

18-16-501. Common nuisance — Criminal offense.

Any tenant who uses or allows another person to use the tenant's leased premises as a common nuisance as defined by § 5-74-109(b) or § 16-105-402 or for a criminal offense as identified in § 18-16-502 may be evicted by the prosecuting attorney of the county, the city attorney of the city, the landlord, the premises owner, or the agent for the premises owner pursuant to the provisions of this subchapter.

History. Acts 2009, No. 464, § 1.

18-16-502. Gambling — Prostitution — Alcohol.

For purposes of this subchapter, any tenant who engages in or allows another person to engage in illegal gambling under § 5-66-107, prostitution as defined by § 5-70-102, or the unlawful sale of alcohol as defined by § 3-3-205 on the tenant's leased premises shall be subject to the eviction procedures established by this subchapter.

History. Acts 2009, No. 464, § 1.

18-16-503. Complaint — Jurisdiction — Definition.

(a) The prosecuting attorney of the county, the city attorney of the city, the landlord, the premises owner, or the agent for the premises owner may file a complaint in the office of the clerk of the court for the eviction of any tenant who has used or has allowed another person to use the tenant's leased premises for use as a common nuisance as defined by § 5-74-109(b) or § 16-105-402 or for a criminal offense as identified in § 18-16-502.

(b) A civil action under this subchapter is cognizable before the:

(1) Circuit court of any county in which an act described in § 18-16-501 or § 18-16-502 is committed; and

(2) District court with jurisdiction concurrent with the jurisdiction of the circuit court if permitted by rule or order of the Supreme Court.

(c) As used in this subchapter, “court” means:

(1) A circuit court; and

(2) If permitted by rule or order of the Supreme Court, a district court.

History. Acts 2009, No. 464, § 1.

18-16-504. Form of complaint.

A complaint filed under this subchapter shall state the name of the tenant or tenants to be evicted, the location of the leased premises, and the basis for which eviction is authorized under this subchapter.

History. Acts 2009, No. 464, § 1.

18-16-505. Summons — Notice.

Upon the filing of a complaint under this subchapter, the clerk of the court shall issue a summons upon the complaint. The summons shall be in customary form directed to the sheriff of the county where the complaint is filed, with direction for service of the complaint on the named defendants. In addition, the court shall issue and direct the sheriff to serve upon the named defendants a notice in the following form:

“NOTICE OF INTENTION TO EVICT FOR CRIMINAL ACTIVITY

You are hereby notified that the attached complaint in the above-styled cause claims that you have engaged in or have allowed the property described in the above-mentioned complaint to be used for criminal activity and that the plaintiff is entitled to have you evicted pursuant to state law. If, within five (5) days, excluding Sundays and legal holidays, after the date of service of this notice you have not filed in the office of the clerk of this court a written objection to the claims made against you by the plaintiff in his or her complaint for eviction, then a writ of possession shall forthwith issue from this office directed to the sheriff of this county or to the police chief of the city ordering him or her to remove you from possession of the property described in the complaint. If you should file a written objection to the complaint of the plaintiff and the allegations for immediate possession of the property described in the complaint within five (5) days, excluding Sundays and legal holidays, after the date of service of this notice, a hearing will be scheduled by the court after you have timely answered to determine whether or not the writ of possession should issue as sought by the plaintiff.

Clerk of Court”

History. Acts 2009, No. 464, § 1.

18-16-506. Written objection.

(a) If within five (5) days, excluding Sundays and legal holidays, following service of this summons, complaint, and notice seeking a writ of possession against the defendants named in the complaint the defendant or defendants have not filed a written objection to the claim for a writ of possession made by the plaintiff in his or her complaint, the clerk of the court shall immediately issue a writ of possession directed to the sheriff of the county or the police chief of the city commanding him or her to cause the defendant or defendants to vacate the property described in the complaint without delay, which the sheriff or police chief shall execute in the manner described in § 18-16-507.

(b)(1) If a written objection to the claim of the plaintiff for a writ of possession is filed by the defendant or defendants within five (5) days after the date of service of the notice, summons, and complaint as provided for in this section, the plaintiff shall obtain a date for the hearing of the plaintiff's demand for a writ of possession of the property described in the complaint after the defendant or defendants have timely answered the complaint.

(2)(A) If a hearing described in subdivision (b)(1) of this section is required, at the hearing the plaintiff shall present evidence sufficient to make a prima facie case of the criminal activity that has been facilitated at the property described in the complaint.

(B) The defendant or defendants shall be entitled to present evidence in rebuttal of the plaintiff's case.

(3) If the court decides upon all the evidence that the plaintiff is entitled to a writ of possession under state law, then the court shall order the clerk of the court to immediately issue a writ of possession to the sheriff of the county or the police chief of the city to evict the defendant or defendants, as provided for in § 18-16-507.

History. Acts 2009, No. 464, § 1.

18-16-507. Writ of possession — Definition.

(a) Upon receipt of a writ of possession from the clerk of the court, the sheriff or police chief shall immediately proceed to execute the writ of possession in the specific manner described in this section and, if necessary, ultimately by ejecting from the property described in the writ of possession the defendant or defendants and any other person or persons who have unlawfully received or entered into the possession of the property after the issuance of the writ of possession, and then notify the plaintiff that the property has been vacated by the defendant or defendants.

(b)(1) Upon receipt of the writ of possession, the sheriff or police chief shall notify the defendant or defendants of the issuance of the writ of possession by delivering a copy of the writ of possession to the

defendant or defendants or to any person authorized to receive summons in civil cases and in like manner.

(2) If within eight (8) hours after receipt of the writ of possession the sheriff or police chief does not find any such defendant as stated in the complaint at his or her normal place of residence, the sheriff or police chief may serve the writ of possession by placing a copy conspicuously upon the front door or other structure of the property described in the complaint, which shall have like effect as if delivered in person pursuant to the terms of the writ of possession.

(c)(1)(A) If at the expiration of twenty-four (24) hours after the service of the writ of possession in the manner indicated the defendant or defendants remain in possession of the property, the sheriff or police chief shall notify the plaintiff or the plaintiff's attorney of that fact and may employ, may engage, and shall be provided with all labor and assistance required by the sheriff or police chief to obtain possession and remove the possessions and belongings of the defendant or defendants from the affected property to a place of storage in a public warehouse or in some other reasonable safe place of storage under the control of the plaintiff.

(B)(i) The defendant or defendants may recover the property stored under subdivision (c)(1)(A) of this section within seven (7) business days.

(ii) Before recovering the property, the defendant or defendants shall pay for the reasonable cost of storage.

(2) If the defendant or defendants do not recover the property as provided in subdivision (c)(1) of this section, then the court shall order the possessions and belongings of the defendant or defendants sold by the plaintiff in a commercially reasonable manner with the proceeds of the sale applied first to the cost of storage, second to any monetary judgment in favor of the plaintiff, and third to the defendant any excess.

(d) In executing the writ of possession, the sheriff or police chief may forcibly remove all locks or other barriers erected to prevent entry upon the premises in any manner which he or she deems appropriate or convenient and, if necessary, physically restrain the defendant or defendants from interfering with the removal of a defendant's property and possessions from the property described in the writ of possession.

(e) If the plaintiff is the city attorney or prosecuting attorney, no bond shall be required. If the plaintiff is the landlord or premises owner, no bond shall be required unless ordered by the court as a condition to the execution of a writ of possession granted prior to the date that an answer is to be filed by the defendant or defendants.

(f) The sheriff or police chief shall return the writ of possession at or before the return date of the writ of possession and shall state in his or her return the manner in which he or she executed the writ of possession and whether or not the defendant or defendants have been ejected from the property described and, if not, the reason for the failure of the sheriff or police chief to do so.

(g) As used in this section, “sheriff or police chief” includes a deputy sheriff, police officer, or other law enforcement official acting at the direction of the sheriff or police chief.

History. Acts 2009, No. 464, § 1.

18-16-508. Costs and attorney’s fees — Damages.

(a)(1) A court granting relief under this subchapter may order in addition to any other costs provided by law the payment by the defendant or defendants to the plaintiff reasonable attorney’s fees and the costs of the action. In such cases, multiple defendants are jointly and severally liable for any payment so ordered.

(2) Any costs or attorney’s fees collected from the defendants shall be remitted to the plaintiff. If the plaintiff is the city attorney, the costs shall be remitted to the city general fund. If the plaintiff is the prosecuting attorney, the costs shall be remitted to the county general fund.

(b) A proceeding brought under this subchapter for eviction of the defendants and occupants of the premises does not preclude the owner or landlord from recovering monetary damages for rent, repairs, or any other incidental damages up to the date of eviction of the defendants and occupants from the premises in a civil action.

History. Acts 2009, No. 464, § 1.

18-16-509. Immunity from civil liability.

For any action or threatened action taken to enforce a right or remedy provided by this subchapter, a landlord, a premises owner, an agent or attorney for the premises owner, and a real estate licensee as defined in § 17-42-103 are immune from civil liability for the breach of an express or implied covenant concerning the possession or quiet enjoyment of the leased premises.

History. Acts 2009, No. 464, § 1.

CHAPTER 17

ARKANSAS RESIDENTIAL LANDLORD — TENANT ACT OF 2007

SUBCHAPTER.

1. TITLE, CONSTRUCTION, APPLICATION, AND SUBJECT MATTER OF CHAPTER.
2. SCOPE AND JURISDICTION.
3. GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION — NOTICE.
4. GENERAL PROVISIONS.
5. LANDLORD OBLIGATIONS.
6. TENANT OBLIGATIONS.
7. LANDLORD REMEDIES.
8. MISCELLANEOUS.
9. EVICTION PROCEEDINGS.

SUBCHAPTER 1 — TITLE, CONSTRUCTION, APPLICATION, AND SUBJECT
MATTER OF CHAPTER

SECTION.	SECTION.
18-17-101. Title.	18-17-104. Settlement of disputed claim or right.
18-17-102. Purposes — Rules of construction.	
18-17-103. Administration of remedies — Enforcement.	

18-17-101. Title.

This chapter shall be known and may be cited as the “Arkansas Residential Landlord — Tenant Act of 2007”.

History. Acts 2007, No. 1004, § 1.

RESEARCH REFERENCES

Ark. L. Notes. Prettyman, The Landlord Protection Act, Arkansas Code § 18-17-101 et seq., 2008 Ark. L. Notes 71.

18-17-102. Purposes — Rules of construction.

- (a) This chapter shall be liberally construed and applied to promote its underlying purposes and policies.
- (b) Underlying purposes and policies of this chapter are:
 - (1) To simplify, clarify, modernize, and revise the law governing rental of dwelling units and the rights and obligations of landlords and tenants; and
 - (2) To encourage landlords and tenants to maintain and improve the quality of housing.

History. Acts 2007, No. 1004, § 1.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Marshall Residential Landlord-Tenant Act of 2007, Prettyman, Landlord Protection Law Revisited: The Amendments to the Arkansas 35 U. Ark. Little Rock L. Rev. 1031 (2013).

18-17-103. Administration of remedies — Enforcement.

- (a) The remedies provided by this chapter shall be administered so that an aggrieved party may recover appropriate damages.
- (b) Any right or obligation declared by this chapter is enforceable by action unless the provision declaring it specifies a different and limited effect.

History. Acts 2007, No. 1004, § 1; 2011, No. 271, § 4. **Amendments.** The 2011 amendment inserted “so” in (a).

18-17-104. Settlement of disputed claim or right.

A claim or right arising under this chapter or on a rental agreement, if disputed in good faith, may be settled by agreement.

History. Acts 2007, No. 1004, § 1.

SUBCHAPTER 2 — SCOPE AND JURISDICTION**SECTION.**

18-17-201. Territorial application.

18-17-202. Exclusions from application of chapter.

SECTION.

18-17-203. Jurisdiction and service of process.

18-17-201. Territorial application.

This chapter applies to, regulates, and determines rights, obligations, and remedies under a rental agreement, wherever made, for a dwelling unit located within this state.

History. Acts 2007, No. 1004, § 1.

18-17-202. Exclusions from application of chapter.

The following arrangements are not governed by this chapter:

(1) Residence at an institution, public or private, if incidental to detention or the provision of medical, geriatric, educational, counseling, religious, or similar service;

(2) Occupancy under a contract of sale of a dwelling unit or the property of which it is a part, if the occupant is the purchaser or a person who succeeds to his or her interest;

(3) Occupancy by a member or a fraternal or social organization in the portion of a structure operated for the benefit of the organization;

(4) Transient occupancy in a hotel, motel, or other accommodations subject to any sales tax on lodging;

(5) Occupancy by an employee of a landlord whose right to occupancy is conditional upon employment in and about the premises;

(6) Occupancy by an owner of a condominium unit or a holder of a proprietary lease in a cooperative;

(7) Occupancy under a rental agreement covering the premises used by the occupant primarily for agricultural purposes; and

(8) Residence, whether temporary or not, at a public or private charitable or emergency protective shelter.

History. Acts 2007, No. 1004, § 1.

18-17-203. Jurisdiction and service of process.

The district court or appropriate court of this state shall exercise jurisdiction over any landlord with respect to any conduct in this state governed by this chapter or with respect to any claim arising from a transaction subject to this chapter.

History. Acts 2007, No. 1004, § 1.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Non-Legislative Commission on the Study of Landlord-Tenant Laws: Report to Governor Mike Beebe, President Pro Tempore of the Senate, and Speaker of the House December 31, 2012, 35 U. Ark. Little Rock L. Rev. 739 (2013).

Lynn Foster, The Hands of the State: The Failure to Vacate Statute and Residential Tenants' Rights In Arkansas, 36 U. Ark. Little Rock L. Rev. 1 (2013).

SUBCHAPTER 3 — GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION — NOTICE

SECTION.

18-17-301. General definitions.

18-17-302. Obligation of good faith.

SECTION.

18-17-303. Notice.

18-17-301. General definitions.

As used in this chapter:

(1) “Action” means a recoupment, counterclaim, suit in equity, and any other proceeding in which rights are determined, including without limitation an action for possession;

(2) “Building and housing codes” means any law, ordinance, or governmental regulation concerning fitness for habitation, or the construction, maintenance, operation, occupancy, use, or appearance of any premises or dwelling unit;

(3)(A) “Dwelling unit” means a structure or the part of a structure that is used as a home, residence, or sleeping place by one (1) person who maintains a household or by two (2) or more persons who maintain a common household and includes landlord-owned mobile homes.

(B) Property that is leased for the exclusive purpose of being renovated by the lessee is not considered a dwelling unit within the meaning of this chapter;

(4) “Good faith” means honesty in fact in the conduct of the transaction concerned;

(5) “Landlord” means the owner, lessor, or sublessor of the premises, and it also means a manager of the premises who fails to disclose as required by this subchapter;

(6) “Organization” means a corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership or association, two (2) or more persons having a joint or common interest, and any other legal or commercial entity;

(7)(A) “Owner” means one (1) or more persons, jointly or severally, in whom is vested all or part of:

(i) The legal title to property; or

(ii) All or part of the beneficial ownership and a right to present use and enjoyment of the premises.

(B) "Owner" includes, but is not limited to, a mortgagee in possession;

(8) "Person" means an individual or organization;

(9) "Premises" means a dwelling unit and the structure of which it is a part and facilities and appurtenances therein and grounds, areas, and facilities held out for the use of tenants generally or whose use is promised to the tenant;

(10) "Rent" means the consideration payable for use of the premises, including late charges whether payable in lump sum or periodic payments, excluding security deposits or other charges;

(11) "Rental agreement" means all agreements, written or oral, and valid rules adopted under this subchapter embodying the terms and conditions concerning the use and occupancy of a dwelling unit and premises;

(12) "Roomer" means a person occupying a dwelling unit:

(A) That does not include the following facilities provided by the landlord:

(i) Toilet;

(ii) Bathtub or shower;

(iii) Refrigerator;

(iv) Stove; and

(v) Kitchen sink; and

(B) Where one (1) or more of these facilities are used in common by occupants in the structure;

(13) "Security deposit" means a monetary deposit from the tenant to the landlord to secure the full and faithful performance of the terms and conditions of the rental agreement as provided in this chapter;

(14)(A) "Single family residence" means a structure maintained and used as a single dwelling unit.

(B) Notwithstanding that a dwelling unit shares one (1) or more walls with another dwelling unit, it is a single family residence if it has direct access to a street or thoroughfare and shares neither heating facilities, hot water equipment, nor any other essential facility or service with any other dwelling unit;

(15) "Tenant" means a person entitled under a rental agreement to occupy a dwelling unit to the exclusion of others; and

(16) "Willful" means an intentional attempt to avoid obligations under the rental agreement or the provisions of this chapter.

History. Acts 2007, No. 1004, § 1;
2009, No. 482, §§ 2, 3.

18-17-302. Obligation of good faith.

Every duty under this chapter and every act that shall be performed as a condition precedent to the exercise of a right or remedy under this chapter imposes an obligation of good faith in its performances or enforcement.

History. Acts 2007, No. 1004, § 1.

18-17-303. Notice.

(a)(1) A person has notice of a fact if:

(A) The person has actual knowledge of it;

(B) The person has received a notice or notification of it; or

(C) From all the facts and circumstances known to him or her at the time in question, he or she has reason to know that it exists.

(2) A person knows or has knowledge of a fact if he or she has actual knowledge of it.

(b)(1) A person notifies or gives a notice or notification to another person by taking steps reasonably calculated to inform the other in ordinary course whether or not the other actually comes to know of it.

(2) A person receives a notice or notification when:

(A) It comes to his or her attention; or

(B) In the case of the landlord, it is delivered at the place of business of the landlord through which the rental agreement was made or at any place held out by the landlord as the place for receipt of the communication; or

(C)(i) In the case of the tenant, it is delivered in hand to the tenant or mailed by registered or certified mail to the tenant at the place held out by him or her as the place for receipt of the communication, or in the absence of the designation, to the tenant's last known place of residence.

(ii) Proof of mailing pursuant to this subsection constitutes notice without proof of receipt.

(c) Notice, knowledge, or a notice or notification received by an organization is effective for a particular transaction from the time it is brought to the attention of the individual conducting that transaction, and in any event from the time it would have been brought to the individual's attention if the organization had exercised reasonable diligence.

(d) The time within which an act is to be done shall be computed by reference to the Arkansas Rules of Civil Procedure.

History. Acts 2007, No. 1004, § 1.

SUBCHAPTER 4 — GENERAL PROVISIONS

SECTION.

18-17-401. Terms and conditions of rental agreement.

18-17-401. Terms and conditions of rental agreement.

(a) A landlord and a tenant may include in a rental agreement terms and conditions not prohibited by this chapter or other rule of law, including, but not limited to, rent, term of the agreement, and other provisions governing the rights and obligations of the parties.

(b)(1) Rent is payable without demand or notice at the time and place agreed upon by the parties.

(2) Unless the tenant is otherwise notified in writing, rent is payable at the dwelling unit and periodic rent is payable at the beginning of any term of one (1) month or less and otherwise in equal monthly installments at the beginning of each month.

(c) Unless the rental agreement fixes a definite term, the tenancy is week to week in case of a roomer who pays weekly rent and in all other cases month to month.

History. Acts 2007, No. 1004, § 1.

SUBCHAPTER 5 — LANDLORD OBLIGATIONS

SECTION.

18-17-501. Security deposits.

18-17-501. Security deposits.

Section 18-16-301 et seq. shall determine:

- (1) Whether a security deposit is required under this chapter; and
- (2) The rights, duties, and remedies of a landlord and tenant concerning a security deposit.

History. Acts 2007, No. 1004, § 1; 501(a)(1) by Acts 2009, No. 482, § 4, is superseded by the amendment of § 18-17-2009, No. 482, § 4; 2009, No. 559, § 2.

A.C.R.C. Notes. Pursuant to Acts 2009, No. 482, § 13, the amendment of § 18-17-501 by Acts 2009, No. 559, § 2.

SUBCHAPTER 6 — TENANT OBLIGATIONS

SECTION.

18-17-601. Tenant to maintain dwelling unit.

SECTION.

18-17-602. Access.
18-17-603. Tenant to use and occupy.

18-17-601. Tenant to maintain dwelling unit.

A tenant shall:

- (1) Comply with all obligations primarily imposed upon tenants by applicable provisions of building and housing codes materially affecting health and safety;
- (2) Keep the dwelling unit and that part of the premises that he or she uses reasonably safe and reasonably clean;
- (3) Dispose from his or her dwelling unit all ashes, garbage, rubbish, and other waste in a reasonably clean and safe manner;
- (4) Keep all plumbing fixtures in the dwelling unit or used by the tenant reasonably clean;
- (5) Use in a reasonable manner all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances, including elevators in the premises;

(6) Not deliberately or negligently destroy, deface, damage, impair, or remove any part of the premises or knowingly permit any person to do so who is on the premises with the tenant's permission or who is allowed access to the premises by the tenant;

(7) Conduct himself or herself and require other persons on the premises with the tenant's permission or who are allowed access to the premises by the tenant to conduct themselves in a manner that will not disturb other tenant's peaceful enjoyment of the premises; and

(8) Comply with the lease and rules that are enforceable pursuant to this subchapter.

History. Acts 2007, No. 1004, § 1.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Dale A. Whitman, Fifty Years of Landlord-Tenant Law: A Perspective, 35 U. Ark. Little Rock L. Rev. 785 (2013).

18-17-602. Access.

(a) A tenant shall not unreasonably withhold consent to the landlord to enter into the dwelling unit in order to inspect the premises, make necessary or agreed repairs, decorations, alterations, or improvements, supply necessary or agreed services, investigate possible rule or lease violations, investigate possible criminal activity, or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workers, or contractors.

(b) A tenant shall not change locks on the dwelling unit without the permission of the landlord.

History. Acts 2007, No. 1004, § 1.

RESEARCH REFERENCES

Ark. L. Notes. Prettyman, The Landlord Protection Act, Arkansas Code § 18-17-101 et seq., 2008 Ark. L. Notes 71.

Ark. L. Rev. Jason Paul Bailey, Comment: Are Landlords the New Police? The Unintended Consequences of the Arkansas Residential Landlord-Tenant Act's Access Provision, 67 Ark. L. Rev. 627 (2014).

U. Ark. Little Rock L. Rev. Non-Legislative Commission on the Study of Land-

lord-Tenant Laws: Report to Governor Mike Beebe, President Pro Tempore of the Senate, and Speaker of the House December 31, 2012, 35 U. Ark. Little Rock L. Rev. 739 (2013).

Marshall Prettyman, Landlord Protection Law Revisited: The Amendments to the Arkansas Residential Landlord-Tenant Act of 2007, 35 U. Ark. Little Rock L. Rev. 1031 (2013).

18-17-603. Tenant to use and occupy.

Unless otherwise agreed, a tenant shall occupy his or her dwelling unit only as a dwelling unit and shall not conduct or permit any illegal activities thereon.

History. Acts 2007, No. 1004, § 1.

SUBCHAPTER 7 — LANDLORD REMEDIES

SECTION.

- 18-17-701. Noncompliance with rental agreement — Failure to pay rent — Removal of evicted tenant's personal property.
- 18-17-702. Noncompliance affecting health and safety.
- 18-17-703. Remedy after termination.

SECTION.

- 18-17-704. Periodic tenancy — Holdover remedies.
- 18-17-705. Landlord remedies for refusal of access to rental property.
- 18-17-706. Payment of rent into court.
- 18-17-707. Bond on appeal and order staying execution.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Non-Legislative Commission on the Study of Landlord-Tenant Laws: Report to Governor Mike Beebe, President Pro Tempore of the

Senate, and Speaker of the House December 31, 2012, 35 U. Ark. Little Rock L. Rev. 739 (2013).

18-17-701. Noncompliance with rental agreement — Failure to pay rent — Removal of evicted tenant's personal property.

(a)(1) Except as provided in this chapter, if there is a noncompliance by the tenant with the rental agreement, the landlord may deliver a written notice to the tenant specifying the acts and omissions constituting the noncompliance and that the rental agreement will terminate upon a date not less than fourteen (14) days after receipt of the notice, if the noncompliance is not remedied in fourteen (14) days.

(2) The rental agreement shall terminate as provided in the notice unless the noncompliance is remediable by repairs or otherwise and the tenant adequately remedies the noncompliance before the date specified in the notice.

(b) If rent is unpaid when due and the tenant fails to pay rent within five (5) days from the date due, the landlord may terminate the rental agreement.

(c)(1) Except as provided in this chapter, the landlord may recover actual damages and obtain injunctive relief, judgments, or evictions in circuit court or district court without posting bond for any noncompliance by the tenant with the rental agreement.

(2) If the tenant's noncompliance is willful other than nonpayment of rent, the landlord may recover reasonable attorney's fees, provided the landlord is represented by an attorney.

(3) If the tenant's nonpayment of rent is not in good faith, the landlord is entitled to reasonable attorney's fees, provided the landlord is represented by an attorney.

History. Acts 2007, No. 1004, § 1; 2009, No. 482, § 5.

RESEARCH REFERENCES

Ark. L. Notes. Prettyman, The Landlord Protection Act, Arkansas Code § 18-17-101 et seq., 2008 Ark. L. Notes 71.

U. Ark. Little Rock L. Rev. Dale A. Whitman, Fifty Years of Landlord-Tenant Law: A Perspective, 35 U. Ark. Little Rock L. Rev. 785 (2013).

Lynn Foster, The Hands of the State: The Failure to Vacate Statute and Residential Tenants' Rights In Arkansas, 36 U. Ark. Little Rock L. Rev. 1 (2013).

18-17-702. Noncompliance affecting health and safety.

(a)(1) If there is noncompliance by the tenant with § 18-17-601 materially affecting health and safety that may be remedied by repair, replacement of a damaged item, or cleaning, and the tenant fails to comply as promptly as conditions require in case of emergency or within fourteen (14) days after written notice by the landlord specifying the noncompliance and requesting that the tenant remedy it within that period of time, the landlord may enter the dwelling unit and cause the work to be done in a workmanlike manner.

(2) The tenant shall reimburse the landlord for the cost of the work.

(3) In addition, the landlord shall have the remedies available under this chapter.

(b) If there is noncompliance by the tenant with this chapter materially affecting health and safety other than as stated in subsection (a) of this section, and the tenant fails to comply as promptly as conditions require in case of emergency or within fourteen (14) days after written notice by the landlord if it is not an emergency, specifying the noncompliance and requesting that the tenant remedy within that period of time, the landlord may terminate the rental agreement.

History. Acts 2007, No. 1004, § 1; 2009, No. 482, § 6.

18-17-703. Remedy after termination.

If the rental agreement is terminated, the landlord has a right to possession and for rent and a separate claim for actual damages for breach of the rental agreement and reasonable attorney's fees.

History. Acts 2007, No. 1004, § 1.

18-17-704. Periodic tenancy — Holdover remedies.

(a) The landlord or the tenant may terminate a week-to-week tenancy by a written notice given to the other at least seven (7) days before the termination date specified in the notice.

(b) The landlord or the tenant may terminate a month-to-month tenancy by a written notice given to the other at least thirty (30) days before the termination date specified in the notice.

(c)(1) If the tenant remains in possession without the landlord's consent after expiration of the term of the rental agreement or its termination, the landlord may bring an action for possession.

(2) If the holdover is not in good faith, the landlord may recover reasonable attorney's fees.

(3) If the tenant's holdover is a willful violation of the provisions of this chapter or the rental agreement, the landlord may also recover an amount not more than three (3) months periodic rent or twice the actual damages sustained by him or her, whichever is greater and reasonable attorney's fees.

(4) If the landlord consents to the tenant's continued occupancy, § 18-17-401(c) applies.

History. Acts 2007, No. 1004, § 1.

18-17-705. Landlord remedies for refusal of access to rental property.

(a) If the tenant refuses to allow lawful access, the landlord may obtain injunctive relief in district court without posting bond to compel access or terminate the rental agreement.

(b) In either case the landlord may recover actual damages and reasonable attorney's fees.

History. Acts 2007, No. 1004, § 1.

RESEARCH REFERENCES

Ark. L. Notes. Prettyman, The Landlord Protection Act, Arkansas Code § 18-17-101 et seq., 2008 Ark. L. Notes 71.

Ark. L. Rev. Jason Paul Bailey, Comment: Are Landlords the New Police? The Unintended Consequences of the Arkansas Residential Landlord-Tenant Act's Access Provision, 67 Ark. L. Rev. 627 (2014).

U. Ark. Little Rock L. Rev. Non-Legislative Commission on the Study of Land-

lord-Tenant Laws: Report to Governor Mike Beebe, President Pro Tempore of the Senate, and Speaker of the House December 31, 2012, 35 U. Ark. Little Rock L. Rev. 739 (2013).

Marshall Prettyman, Landlord Protection Law Revisited: The Amendments to the Arkansas Residential Landlord-Tenant Act of 2007, 35 U. Ark. Little Rock L. Rev. 1031 (2013).

18-17-706. Payment of rent into court.

In any action in which the landlord sues for possession and the tenant raises defenses or counterclaims under this chapter or the rental agreement:

(1)(A)(i) The tenant shall pay the landlord all rent that becomes due after the issuance of a written order requiring the tenant to vacate or show cause as rent becomes due.

(ii) The landlord shall provide the tenant with a written receipt for each payment except when the tenant pays by check.

- (B) Rent shall not be abated for a condition caused by the deliberate or negligent act or omission of the tenant, a member of his or her family, or other person on the premises with his or her permission or who is allowed access to the premises by the tenant;
- (2) The tenant shall pay the landlord all rent allegedly owed before the issuance of the order, provided that in lieu of the payment the tenant may be allowed to submit to the court a receipt or cancelled check, or both, indicating that payment has been made to the landlord;
- (3)(A) Should the tenant not appear and show cause within ten (10) days, the court shall issue a writ of possession under this subchapter.
- (B)(i) Should the tenant appear in response to the order and allege that rent due under subdivision (1) or (2) of this section has been paid, the court shall determine the issue.
- (ii) If the tenant has failed to comply with subdivision (1) or (2) of this section, the court shall issue a writ of possession and the landlord shall be placed in full possession of the premises by the sheriff; and
- (4)(A) If the amount of rent due is found at final adjudication to be less than alleged by the landlord, judgment shall be entered for the amount found due to the landlord.
- (B) If the court finds at final adjudication that no rent is due and no damages are due the landlord, judgment shall be entered for the tenant.

History. Acts 2007, No. 1004, § 1;
2009, No. 311, § 1; 2009, No. 482, § 7.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Marshall Residential Landlord-Tenant Act of 2007,
Prettyman, Landlord Protection Law Re- 35 U. Ark. Little Rock L. Rev. 1031 (2013).
visited: The Amendments to the Arkansas

18-17-707. Bond on appeal and order staying execution.

- (a) Upon appeal to the circuit court, the case shall be heard in a manner consistent with the rules of the circuit court as soon as is feasible after the appeal is docketed.
- (b)(1) It is sufficient to stay execution of a judgment for possession that the tenant sign a bond that he or she will pay to the landlord the amount of rent, determined by the court in accordance with §§ 18-17-705 and 18-17-706, as it becomes due periodically after the judgment was entered.
- (2) Any circuit judge shall order a stay of execution upon the bond.
- (c) The bond by the tenant and the order staying execution may be substantially in the following form:
- “State of Arkansas County of _____
_____ Landlord
vs.
_____ Tenant

Bond to Stay

Execution on Appeal to Circuit Court

Now comes the tenant in the above entitled action and respectfully shows the court that a writ of possession was issued against the tenant and for the landlord on the ____ day of _____, 20____, by the district court. Tenant has appealed the judgment.

Pursuant to the findings of the district court, the tenant is obligated to pay rent in the amount of \$_____ per ____, due on the ____ day of each _____.

Tenant bonds to pay the periodic rent hereinafter due according to the findings of the court and moves the circuit court to stay execution on the writ of possession until this matter is heard on appeal and decided by the circuit court.

This the ____ day of _____, 20____

Tenant

Upon execution of the bond, execution on the judgment of eviction is stayed until the action is heard on appeal and decided by the circuit court. If tenant fails to make any rental payment within five (5) days of the due date, upon application of the landlord, the stay of execution shall dissolve, the appeal by the tenant to the circuit court on issues dealing with possession shall be dismissed and the sheriff shall dispossess the tenant.

This the ____ day of _____, 20____

Judge”

(d) If the tenant fails to make a payment within five (5) days of the due date according to the bond and order staying execution, the clerk, upon application of the landlord, shall issue a writ of possession to be executed pursuant to § 18-17-904.

History. Acts 2007, No. 1004, § 1;
2009, No. 311, § 2.

SUBCHAPTER 8 — MISCELLANEOUS

SECTION.

18-17-801. Severability.

SECTION.

18-17-802. Prior transactions.

18-17-801. Severability.

If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or application of this chapter that may be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

History. Acts 2007, No. 1004, § 1.

18-17-802. Prior transactions.

Transactions entered into before July 31, 2007, and not extended or renewed on or after that date, and the rights, duties, and interests flowing from them remain valid and may be terminated, completed, consummated, or enforced as required or permitted by any statute or other law amended or repealed by this chapter as though the repeal or amendment had not occurred.

History. Acts 2007, No. 1004, § 1.

SUBCHAPTER 9 — EVICTION PROCEEDINGS

SECTION.	SECTION.
18-17-901. Grounds for eviction of tenant.	18-17-908. Effect of judgment for defendant.
18-17-902. Eviction proceeding.	18-17-909. Appeal.
18-17-903. Service of order — Posting and mailing requirements.	18-17-910. Bond required to stay eviction on appeal.
18-17-904. Tenant ejected on failure to show cause.	18-17-911. Accrual of rent after institution of proceedings.
18-17-905. Trial of issue.	18-17-912. Commercial leases.
18-17-906. Designation of parties in eviction.	18-17-913. Execution of writ of possession.
18-17-907. Effect of judgment for plaintiff.	

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Non-Legislative Commission on the Study of Landlord-Tenant Laws: Report to Governor Mike Beebe, President Pro Tempore of the Senate, and Speaker of the House December 31, 2012, 35 U. Ark. Little Rock L. Rev. 739 (2013).	Lynn Foster, The Hands of the State: The Failure to Vacate Statute and Residential Tenants' Rights In Arkansas, 36 U. Ark. Little Rock L. Rev. 1 (2013).
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18-17-901. Grounds for eviction of tenant.

- (a) A landlord or his or her agent may commence eviction proceedings against a tenant in a district court having jurisdiction over the eviction proceeding, when:
- (1) The tenant fails or refuses to pay the rent when due or when demanded;
 - (2) The term of tenancy or occupancy has ended; or
 - (3) The terms or conditions of the rental agreement have been violated.
- (b) For residential rental agreements, nonpayment of rent within five (5) days of the date due constitutes legal notice to the tenant that

the landlord has the right to begin eviction proceedings under this chapter.

History. Acts 2007, No. 1004, § 1; 2009, No. 311, § 3; 2009, No. 482, § 8.

RESEARCH REFERENCES

<p>Ark. L. Notes. Prettyman, The Landlord Protection Act, Arkansas Code § 18-17-101 et seq., 2008 Ark. L. Notes 71.</p> <p>U. Ark. Little Rock L. Rev. Marshall</p>	<p>Prettyman, Landlord Protection Law Revisited: The Amendments to the Arkansas Residential Landlord-Tenant Act of 2007, 35 U. Ark. Little Rock L. Rev. 1031 (2013).</p>
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18-17-902. Eviction proceeding.

(a)(1)(A) When grounds exist for eviction of a tenant under this subchapter, a landlord or his or her agent may commence an action for eviction by filing with a district court having jurisdiction a complaint and supporting affidavit of eviction that specifies the grounds for the eviction.

(B) The supporting affidavit shall be signed by a person with personal knowledge of the grounds for eviction.

(2) The fee for filing an action under this chapter by a complaint with supporting affidavit of eviction shall be as provided in § 16-17-705.

(b) Upon the filing by the landlord or his or her agent or attorney of a complaint and supporting affidavit of eviction, the district court shall issue an order requiring the tenant to vacate the occupied premises or to show cause why he or she should not be evicted by the court within ten (10) calendar days after the date of service of a copy of the order upon the tenant.

History. Acts 2007, No. 1004, § 1; 2009, No. 311, § 4.

18-17-903. Service of order — Posting and mailing requirements.

(a) The copy of the order to vacate under § 18-17-902 may be served in the manner as is provided by law for the service of the summons in actions pending in the district court of this state.

(b) When service in accordance with subsection (a) of this section has been unsuccessfully attempted and no person is found in possession of the premises, the copy of the order to vacate may be served by leaving it affixed to the most conspicuous part of the premises.

History. Acts 2007, No. 1004, § 1; 2009, No. 311, § 5.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Marshall Residential Landlord-Tenant Act of 2007, Prettyman, Landlord Protection Law Re- 35 U. Ark. Little Rock L. Rev. 1031 (2013).
visited: The Amendments to the Arkansas

18-17-904. Tenant ejected on failure to show cause.

If the tenant fails to appear and show cause within the ten-calendar-day period provided in § 18-17-902(b) as directed by the order or at the court appointed hearing date, the court shall enter judgment in favor of the plaintiff and direct the clerk to issue a writ of possession, and the tenant shall be evicted by the sheriff of the county.

History. Acts 2007, No. 1004, § 1;
2009, No. 311, § 6; 2009, No. 482, § 9.

18-17-905. Trial of issue.

If the tenant appears and contests eviction, the court shall hear and determine the case as any other civil case.

History. Acts 2007, No. 1004, § 1.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Marshall Residential Landlord-Tenant Act of 2007, Prettyman, Landlord Protection Law Re- 35 U. Ark. Little Rock L. Rev. 1031 (2013).
visited: The Amendments to the Arkansas

18-17-906. Designation of parties in eviction.

In any eviction proceeding in a district court, the landlord shall be designated as plaintiff and the tenant as defendant.

History. Acts 2007, No. 1004, § 1;
2009, No. 311, § 7.

18-17-907. Effect of judgment for plaintiff.

If the judgment is for the plaintiff, the district court shall within three (3) days issue a writ of eviction, and the tenant shall be evicted by the sheriff of the county.

History. Acts 2007, No. 1004, § 1;
2009, No. 311, § 8.

18-17-908. Effect of judgment for defendant.

If the judgment is for the defendant, the tenant shall be entitled to remain in possession until:

(1) The termination of his or her tenancy by agreement or operation of law;

(2) Failure or neglect to pay rent; or

(3) Eviction in another proceeding under this chapter or by the judgment of a court of competent jurisdiction.

History. Acts 2007, No. 1004, § 1;
2009, No. 311, § 9.

18-17-909. Appeal.

Either party may appeal in an eviction case and the appeal shall be heard and determined as other appeals in civil cases.

History. Acts 2007, No. 1004, § 1.

18-17-910. Bond required to stay eviction on appeal.

(a) An appeal in an eviction case will not stay eviction unless at the time of appealing the tenant shall give an appeal bond as in other civil cases for an amount to be fixed by the court and conditioned for the payment of all costs and damages that the landlord may sustain.

(b) If the tenant fails to file the bond within five (5) days after service of the notice of appeal, the appeal shall be dismissed.

History. Acts 2007, No. 1004, § 1.

18-17-911. Accrual of rent after institution of proceedings.

(a)(1) After the commencement of eviction proceedings by the issuance of an order to vacate or to show cause as provided in § 18-17-902, the rent for the use and occupancy of the premises involved shall continue to accrue so long as the tenant remains in possession of the premises at the rate as prevailed immediately before the issuance of the order to vacate or show cause.

(2) The tenant shall be liable for the payment of the rent, the collection of which may be enforced as provided with respect to other rents.

(b) The acceptance by the landlord of any rent, whether it shall have accrued at the time of the issuance of the order to vacate or to show cause or shall subsequently accrue, shall not operate as a waiver of the landlord's right to insist upon eviction or as a renewal or extension of the tenancy, but the rights of the parties as they existed at the time of the issuance of the order to vacate or to show cause shall control.

History. Acts 2007, No. 1004, § 1;
2009, No. 311, § 10; 2009, No. 482, § 10.

18-17-912. Commercial leases.

(a) In any action involving a commercial lease in which the landlord sues for possession and the tenant raises defenses or counterclaims under this chapter or the lease agreement:

(1)(A) The tenant shall pay the landlord all rent that becomes due after the issuance of the order requiring the tenant to vacate or show cause as rent becomes due.

(B) The landlord shall provide the tenant with a written receipt for each payment except when the tenant pays by check; and

(2)(A) The tenant shall pay the landlord all rent allegedly owed before the issuance of the order to vacate or to show cause.

(B) However, in lieu of the payment under subdivision (a)(2)(A) of this section the tenant may be allowed to submit to the court a receipt or cancelled check, or both, indicating that payment has been made to the landlord.

(b)(1) If the amount of rent is in controversy, the court shall preliminarily determine the amount of rent to be paid to the landlord.

(2)(A) If the tenant appears in response to the order to vacate or to show cause and alleges that rent due owed under § 18-17-911 and this section has been paid, the court shall determine the issue.

(B) If the tenant has failed to comply with § 18-17-911 and this section, the court shall issue a writ of possession, and the landlord shall be placed in full possession of the premises by the sheriff.

(3) If the amount of rent due is determined at final adjudication to be less than the amount alleged by the landlord, judgment shall be entered for the tenant if the court determines that the tenant has complied fully with the provisions of § 18-17-911, this section, and the lease agreement.

(4) If the court orders that the tenant pay all rent due and accruing as of and during the pendency of the action, the judgment may require the payments to be made to either the:

(A) Commercial landlord; or

(B)(i) Clerk of the district court who shall hold the payments until the final disposition of the case.

(ii)(a) If payments are to be made through the district clerk's office, a fee of three percent (3%) of the rental payment shall be added to the amount paid through the district clerk's office.

(b) The fee of three percent (3%) shall be retained by the district clerk's office to defray the costs of collection.

(c) If the tenant fails to make a payment as provided in § 18-17-911 and this section, the tenant's failure to comply entitles the landlord to execution of the judgment for possession, and upon application of the landlord, the district court shall issue a writ of possession and the landlord shall be placed in full possession of the premises by the sheriff or his or her deputy.

History. Acts 2007, No. 1004, § 1; 2009, No. 311, § 11; 2009, No. 482, § 11.

18-17-913. Execution of writ of possession.

In executing a writ of possession, the sheriff shall proceed in accordance with the provisions of § 18-60-310.

History. Acts 2007, No. 1004, § 1;
2009, No. 311, § 12.

CHAPTERS 18-26

[Reserved]

SUBTITLE 3. PERSONAL PROPERTY**CHAPTER 27****RIGHTS IN PERSONAL PROPERTY****SUBCHAPTER.**

1. GENERAL PROVISIONS.
2. PAWNBROKERS.
3. DEALER IN SECONDHAND GOODS REFORM AND DISCLOSURE ACT.

SUBCHAPTER 1 — GENERAL PROVISIONS**SECTION.**

- 18-27-101. Joint tenancy in stock certificate.
18-27-102. Safe-deposit boxes.

SECTION.

- 18-27-103. Abandonment of personal property.

18-27-101. Joint tenancy in stock certificate.

(a) In any instance in which any corporation or cooperative association organized under the laws of the State of Arkansas may issue any stock certificate or other form of certificate of any character evidencing ownership or equity in the corporation or cooperative association in two (2) or more persons and shall use the word “or” between the names of the persons to whom it is issued so as to cause the same to read in the alternative, the persons to whom the certificate is issued in this form shall hold and own the same as joint tenants and not as tenants in common. Full and complete ownership of the certificate so issued shall pass and belong to the last survivor of the persons so named.

(b) Any one (1) of the persons to whom any certificate may be issued in manner and form as provided in subsection (a) of this section may endorse, assign, or transfer the certificate as fully and as effectively as could all persons therein named joining together. The endorsement, assignment, or transfer so made shall be fully binding on all persons named therein.

History. Acts 1959, No. 161, §§ 1, 2;
A.S.A. 1947, §§ 50-110, 50-111.

Publisher’s Notes. Acts 1959, No. 161,
§§ 1, 2, are also codified as § 4-25-105.

18-27-102. Safe-deposit boxes.

(a) Any state, national or private bank, savings and loan association, hotel, or other private safe-deposit company, in this subchapter referred to as a bank, financial institution, or company, may maintain safe-deposit boxes and rent the safe-deposit boxes.

(b)(1) If a safe-deposit box is held in the name of two (2) or more persons jointly, any one (1) of such persons shall be entitled to access to the box and shall be permitted to remove the contents thereof, and the bank, financial institution, or company shall not be responsible for any damage arising by reason of the access or removal by one (1) of the persons.

(2) The death of one (1) holder of a jointly held safe-deposit box does not affect the right of any other holder of the box to have access to and remove contents from the box.

(c)(1) If the box rental is delinquent for six (6) months, the bank, financial institution, or company, after at least thirty (30) days' notice by certified return receipt mail addressed to the lessee at his or her last known address on the books of the bank, financial institution, or company, if the rent is not paid within the time specified in the notice, may open the box in the presence of two (2) employees, at least one (1) of whom is an officer or manager of the bank, financial institution, or company, and a notary public.

(2) The bank, financial institution, or company must inventory the contents of the box in detail and place the contents of the box in a sealed envelope or container bearing the name of the lessee.

(3)(A) The bank, financial institution, or company shall then hold the contents of the box subject to a lien for its rental, the cost of opening the box, and the damages in connection therewith.

(B) If such rental, cost, and damages are not paid within two (2) years from the date of opening of such box, the bank, financial institution, or company may sell any part or all of the contents at public auction in like manner and upon like notice as is prescribed for the sale of real property under mortgage or deed of trust.

(C) Any unauctioned contents of boxes and any excess proceeds from such sale shall be remitted to the Auditor of State under the procedures prescribed by § 18-28-201 et seq.

History. Acts 1991, No. 415, § 1.

A.C.R.C. Notes. The former Uniform Disposition of Unclaimed Property Act, referred to in this section by the reference to "§ 18-28-201 et seq.," was repealed, with the exception of what will be current

§ 18-28-230, and replaced by the enactment of the Unclaimed Property Act by Acts 1999, No. 850. The Unclaimed Property Act is now codified as § 18-28-201 et seq.

18-27-103. Abandonment of personal property.

(a) Upon the purchase of land at a judicial sale, nonjudicial foreclosure sale, under the Arkansas Statutory Foreclosure Act, § 18-50-101 et seq., or otherwise, or a tax sale, all personal property remaining on

the land or in any structure on the land shall be considered to have been abandoned if:

(1) The owner of the personal property has received notice of the sale of the land and has neither removed the personal property nor notified the purchaser in writing of the owner's claim to the personal property within thirty (30) days of recording the deed commemorating the sale; or

(2)(A) After the sale, the purchaser may mail to the last known mailing address of all previous occupants and post notice of the sale of the land and the owner of the personal property has not:

(i) Removed the personal property; or

(ii) Notified the purchaser in writing of the owner's claim to the personal property within thirty (30) days of the posting of the notice.

(B) The notice shall be dated, mailed by certified mail, posted conspicuously on the land, and contain a statement that informs the owner of the personal property that all personal property not removed or claimed within the thirty (30) days of the posting date period shall be considered abandoned.

(b)(1) If the owner of the personal property does not remove the personal property within thirty (30) days, but merely gives the purchaser written notice of the owner's claim, the purchaser may remove and store the personal property at the owner's expense.

(2)(A) The personal property shall be stored for no more than thirty (30) days at the owner's expense.

(B) If the owner of the personal property does not take possession of the personal property and pay the reasonable expense of storage within the thirty (30) days, the personal property shall be considered abandoned.

(c) A purchaser of land that disposes of personal property that is considered abandoned under this section is not subject to liability or suit.

(d) The following property is not personal property that may be considered abandoned under this section:

(1) A manufactured home or mobile home on which a creditor or other party holds a mortgage, lien, security interest, or other encumbrance; and

(2) Abandoned personal property on which a creditor or other party holds a mortgage, lien, security interest, or other encumbrance.

History. Acts 2015, No. 1139, § 1.

SUBCHAPTER 2 — PAWNBROKERS

SECTION.

18-27-201 — 18-27-203. [Repealed.]

18-27-204. Limitations on the purchase

and disposition of personal property — Definition.

Cross References. Pawnshops to keep records, § 12-12-103.

RESEARCH REFERENCES

ALR. Validity of statutes, ordinances, and regulations governing pawn shops. 16 A.L.R.6th 219.

Ark. L. Rev. Legislation — No. 86 — Pawnbroker Required to Return Stolen Property to True Owner, 15 Ark. L. Rev. 432.

Nickles and Adams, Pawnbrokers, Police, and Property Rights — A Proposed Constitutional Balance, 47 Ark. L. Rev. 793.

18-27-201 — 18-27-203. [Repealed.]

Publisher's Notes. These sections, concerning pawnbrokers, were repealed by Acts 2013, No. 1464, § 1. The sections were derived from the following sources:

18-27-201. Acts 1961, No. 86, § 1; A.S.A. 1947, § 67-1130.

18-27-202. Acts 1961, No. 86, § 2; A.S.A. 1947, § 67-1131.

18-27-203. Acts 1961, No. 86, § 3; A.S.A. 1947, § 67-1132.

18-27-204. Limitations on the purchase and disposition of personal property — Definition.

(a) As used in this section, “pawnbroker” means any person, firm, or corporation, or an agent of any person, firm, or corporation, who is engaged in the business of lending money upon the security of articles of personal property or purchasing personal property.

(b) No pawnbroker shall purchase or receive personal property as security from any person under eighteen (18) years of age who has not been emancipated under § 9-26-104.

(c) A pawnbroker shall not dispose of personal property purchased or received as security until at least fifteen (15) calendar days after the personal property is purchased or pawned or at least seven (7) calendar days after the purchase or pawn is reported to the local police, whichever comes first, unless the personal property is:

- (1) Redeemed by the person who sold or pawned it; or
- (2) Returned to the rightful owner of the personal property.

(d) The provisions of this section shall not be applicable to personal property purchased by the pawnbroker from a retailer or a wholesaler.

(e)(1) The failure on the part of a pawnbroker to comply with a provision of this section shall be a violation.

(2) Upon conviction, the offender shall be punished by a fine of not more than one thousand dollars (\$1,000).

History. Acts 1993, No. 1131, § 1; 2005, No. 1994, § 94; 2015, No. 1242, § 2.

A.C.R.C. Notes. Acts 2015, No. 1242, § 1, provided: “Findings and legislative

intent. The General Assembly finds and determines that:

“(1) Certain provisions of Arkansas law requiring a pawnbroker to turn over per-

sonal property based upon the affidavit of the alleged owner without a judicial determination of the merits of the demanding owner's claim, and the pawnbroker's corresponding liability for costs, attorney's fees, and damages, were held to be unconstitutional in *Landers v. Jameson*, 355 Ark. 163, 132 S.W.3d 741 (2003), for failure to provide the pawnbroker notice and an opportunity for a hearing before taking the property pawned to the pawnbroker; stolen property before releasing the property to the true owner;

"(2) The law should encourage dealers in secondhand goods, including pawnbrokers, to return stolen property to the rightful owner without penalty while protecting respective property rights;

"(3) To assist the recovery of stolen property:

"(A) Full disclosure should be made of the respective rights of the parties to stolen property to encourage:

"(i) The parties to resolve disputed claims to stolen property; and

"(ii) The reporting of acts of theft and dishonesty to appropriate law enforcement authorities; and

"(B) A right to recover and deliver stolen property without the threat of additional loss; and

"(4) Appropriate penalties should be provided if:

"(A) The rights of the parties to stolen property in the possession of a dealer are not disclosed by the dealer;

"(B) Clearly identifiable stolen property is wrongfully withheld from the rightful owner; or

"(C) Stolen property is defaced or other action is taken to hide or hinder the identification of stolen property."

Amendments. The 2015 amendment substituted "A pawnbroker shall not" for "No pawnbroker shall" in (c); inserted designation (c)(1); and added (c)(2).

RESEARCH REFERENCES

ALR. Validity of statutes, ordinances, and regulations governing pawn shops. 16 A.L.R.6th 219.

SUBCHAPTER 3 — DEALER IN SECONDHAND GOODS REFORM AND DISCLOSURE ACT

SECTION.

18-27-301. Title.

18-27-302. Definitions.

18-27-303. Recovery of personal property and identifiable stolen personal property — Liability.

18-27-304. Notice concerning recovery of personal property and identifiable stolen personal property.

SECTION.

18-27-305. Limitations on the purchase, maintenance, and disposition of personal property — Defacing identifiable stolen personal property.

18-27-306. Penalties.

A.C.R.C. Notes. Acts 2015, No. 1242, § 1, provided: "Findings and legislative intent. The General Assembly finds and determines that:

"(1) Certain provisions of Arkansas law requiring a pawnbroker to turn over personal property based upon the affidavit of the alleged owner without a judicial deter-

mination of the merits of the demanding owner's claim, and the pawnbroker's corresponding liability for costs, attorney's fees, and damages, were held to be unconstitutional in *Landers v. Jameson*, 355 Ark. 163, 132 S.W.3d 741 (2003), for failure to provide the pawnbroker notice and an opportunity for a hearing before taking

the property pawned to the pawnbroker; stolen property before releasing the property to the true owner;

“(2) The law should encourage dealers in secondhand goods, including pawnbrokers, to return stolen property to the rightful owner without penalty while protecting respective property rights;

“(3) To assist the recovery of stolen property:

“(A) Full disclosure should be made of the respective rights of the parties to stolen property to encourage:

“(i) The parties to resolve disputed claims to stolen property; and

“(ii) The reporting of acts of theft and dishonesty to appropriate law enforcement authorities; and

“(B) A right to recover and deliver stolen property without the threat of additional loss; and

“(4) Appropriate penalties should be provided if:

“(A) The rights of the parties to stolen property in the possession of a dealer are not disclosed by the dealer;

“(B) Clearly identifiable stolen property is wrongfully withheld from the rightful owner; or

“(C) Stolen property is defaced or other action is taken to hide or hinder the identification of stolen property.”

18-27-301. Title.

This subchapter shall be known and may be cited as the “Dealer in Secondhand Goods Reform and Disclosure Act”.

History. Acts 2015, No. 1242, § 3.

18-27-302. Definitions.

As used in this subchapter:

(1) “Dealer” means an individual or entity that is engaged in the business of:

(A) Lending money upon the security of an article of personal property that is retained by the individual or entity until:

(i) The loan is repaid; or

(ii) The time to repay the loan has expired; or

(B) Purchasing other than at wholesale or retail an article of personal property for resale in any form;

(2) “Defacing identifiable stolen personal property” means performing or acquiescing in an act designed to remove, destroy, mutilate, disguise, or otherwise purposefully and willfully prevent detection of identifiable stolen personal property;

(3) “Identifiable stolen personal property” means personal property that is:

(A) Reported stolen to an appropriate law enforcement agency;

(B) Described in the official stolen property report of the law enforcement agency by serial number, vehicle identification number, license registration number, or other numbers, letters, symbols, or markings that authenticate the specific personal property in the possession of the dealer; and

(C) Connected by documentation, such as a receipt, presented to the dealer by the owner demonstrating the likelihood of current ownership; and

(4) “Insider” means a family member or friend of the owner of stolen property.

History. Acts 2015, No. 1242, § 3.

18-27-303. Recovery of personal property and identifiable stolen personal property — Liability.

(a) An owner of stolen personal property may request that a dealer return the stolen property without charge to the owner by signing and following the terms of the affidavit in favor of the dealer as described in § 18-27-304(b).

(b) Unless reasonable cause exists, within seven (7) days after the later of the receipt of an affidavit described in § 18-27-304(b) and the written release, either conditional or outright, of any property hold issued by any law enforcement agency with respect to the identifiable stolen property, a dealer shall:

(1) Deliver the identifiable stolen property to the owner; or

(2) File a legal action in a court of competent jurisdiction to determine ownership.

(c) If the dealer refuses to make an election under subsection (b) of this section, the owner may file a replevin action to recover the property and the court may award and apportion costs and attorney’s fees as appropriate under the facts of the case.

History. Acts 2015, No. 1242, § 3.

18-27-304. Notice concerning recovery of personal property and identifiable stolen personal property.

(a) Once an owner requests the return of stolen property, a dealer shall deliver a written notice as to the owner’s rights.

(b) The written notice required by subsection (a) of this section shall be written in bold letters that are each at least 12-point type and read as follows:

“NOTICE CONCERNING STOLEN PROPERTY

PLEASE TAKE NOTICE THAT THE RIGHTFUL OWNER MAY ASK A DEALER IN SECONDHAND GOODS (“DEALER”) TO RETURN STOLEN PROPERTY BY SHOWING PROOF OF OWNERSHIP OF THE PROPERTY AND SIGNING AN AFFIDAVIT AS TO OWNERSHIP, INDEMNIFYING AND HOLDING THE DEALER HARMLESS FROM LOSS (“AFFIDAVIT”). THE AFFIDAVIT MUST RELATE TO IDENTIFIABLE STOLEN PERSONAL PROPERTY AND BE IN THE FORM BELOW OR ATTACHED TO THIS NOTICE. AFTER DELIVERY OF THE AFFIDAVIT TO THE DEALER AND THE RELEASE OF ANY PROPERTY HOLD PLACED ON THE PROP-

ERTY BY A LAW ENFORCEMENT AGENCY, THE DEALER HAS SEVEN (7) DAYS TO EITHER RELINQUISH THE IDENTIFIABLE STOLEN PERSONAL PROPERTY OR FILE A LEGAL ACTION IN COURT TO DETERMINE OWNERSHIP.

IF THE DEALER REFUSES TO DELIVER THE PROPERTY OR FILE AN ACTION IN COURT TO DETERMINE OWNERSHIP WITHIN SEVEN (7) DAYS THEREAFTER, THE OWNER MAY ATTEMPT TO RECOVER THE ITEMS OF STOLEN PERSONAL PROPERTY WITHOUT PAYMENT TO THE DEALER BY FILING A LEGAL ACTION IN COURT. IF THE COURT DETERMINES THAT THE DEALER REFUSED TO EITHER DELIVER THE PERSONAL PROPERTY OR FILE AN ACTION IN COURT TO DETERMINE OWNERSHIP WITHIN SEVEN (7) DAYS, WITHOUT REASONABLE CAUSE, THE DEALER COULD BE ORDERED TO RETURN THE IDENTIFIABLE STOLEN PERSONAL PROPERTY TO THE OWNER WITHOUT CHARGE TO THE OWNER.

HOWEVER, IF THE COURT DETERMINES THAT THE PROPERTY WAS ACQUIRED BY THE DEALER FROM A FAMILY MEMBER OR FRIEND, THE OWNER IS ENTITLED TO RECOVER THE PROPERTY ONLY UPON REIMBURSING THE COST TO THE DEALER OF ACQUIRING THE PROPERTY.

IF LEGAL ACTION IS FILED TO RECOVER PROPERTY IN THE POSSESSION OF THE DEALER, THE COURT MAY AWARD AND APPORTION COSTS AND ATTORNEY'S FEES AS APPROPRIATE.

"IDENTIFIABLE STOLEN PERSONAL PROPERTY" MEANS PERSONAL PROPERTY THAT IS:

(A) REPORTED STOLEN TO AN APPROPRIATE LAW ENFORCEMENT AGENCY;

(B) DESCRIBED IN THE OFFICIAL STOLEN PROPERTY REPORT OF THE LAW ENFORCEMENT AGENCY BY SERIAL NUMBER, VEHICLE IDENTIFICATION NUMBER, LICENSE REGISTRATION NUMBER, OR OTHER NUMBERS, LETTERS, SYMBOLS, OR MARKINGS THAT AUTHENTICATE THE SPECIFIC PERSONAL PROPERTY IN THE POSSESSION OF DEALER; AND

(C) CONNECTED BY DOCUMENTATION (SUCH AS A RECEIPT) PRESENTED TO THE DEALER BY THE OWNER DEMONSTRATING THE LIKELIHOOD OF CURRENT OWNERSHIP.

TO PROCEED, PLEASE COMPLETE THE FOLLOWING AFFIDAVIT AND DELIVER TO THE DEALER.

AFFIDAVIT AS TO OWNERSHIP, INDEMNITY AND HOLD HARMLESS AGREEMENT

STATE OF ARKANSAS

COUNTY OF _____

BEFORE THE UNDERSIGNED, _____, DULY QUALIFIED AND ACTING IN AND FOR THIS COUNTY AND STATE, APPEARED _____ [TO ME WELL

KNOWN] [SATISFACTORILY PROVEN] TO BE THE AFFIANT
HEREIN, WHO STATED THE FOLLOWING UNDER OATH:

1. I, _____, AM THE SOLE, TRUE
AND ABSOLUTE OWNER OF PERSONAL PROPERTY ("PROP-
ERTY"), FREE OF ANY LIENS AND ENCUMBRANCES DE-
SCRIBED AS:

AND CURRENTLY IN THE POSSESSION OF:

(“DEALER”)

2. I HAVE REPORTED THE PROPERTY STOLEN TO THE
APPROPRIATE LAW ENFORCEMENT AGENCY AND HAVE PRE-
SENTED THE DEALER WITH THE FOLLOWING DOCUMENTA-
TION WITH REGARD TO MY OWNERSHIP OF THE PROPERTY
AND SUCH DOCUMENTATION IS ATTACHED HERETO:

a. OFFICIAL STOLEN PROPERTY REPORT OF A LAW EN-
FORCEMENT AGENCY SHOWING SERIAL NUMBER, VEHICLE
IDENTIFICATION NUMBER, LICENSE REGISTRATION NUM-
BER, OR OTHER NUMBERS, LETTERS, SYMBOLS, OR MARK-
INGS THAT AUTHENTICATE THE SPECIFIC PERSONAL PROP-
ERTY IN THE POSSESSION OF DEALER. SAID REPORT IS
ISSUED BY:

AND HAS A REPORT NUMBER OF _____

b. DOCUMENTATION DEMONSTRATING THE LIKELIHOOD
OF MY CURRENT OWNERSHIP OF THE PROPERTY, SPECIFI-
CALLY DESCRIBED AS: _____

3. I WILL COOPERATE WITH LAW ENFORCEMENT AND THE
PROSECUTOR IN ALL RESPECTS REGARDING THE THEFT OF
PROPERTY.

4. I UNDERSTAND THE DEALER CANNOT RELEASE PROP-
ERTY THAT IS SUBJECT TO A LAW ENFORCEMENT PROPERTY
HOLD AND ANY SUCH HOLD MUST BE REMOVED BEFORE
THE PROPERTY CAN BE DELIVERED TO ME.

5. I UNDERSTAND THE DEALER HAS SEVEN (7) DAYS TO
EITHER RELEASE THE PROPERTY TO ME OR FILE A LEGAL
ACTION TO DETERMINE OWNERSHIP.

6. THE PERSON THAT CAUSED THE ITEM TO BE IN THE
POSSESSION OF THE DEALER IS NOT A FAMILY MEMBER OR
FRIEND OF MINE.

7. I UNDERSTAND THAT I MAY BE SUBJECT TO CIVIL OR
CRIMINAL PENALTIES IF THE REPRESENTATIONS I AM MAK-
ING HEREIN ARE UNTRUE.

8. I WILL INDEMNIFY AND HOLD THE DEALER HARMLESS
FOR ANY AND ALL LOSS OCCASIONED BY THE REPRESENTA-

TIONS MADE IN THIS AFFIDAVIT WITH REGARD TO THE PROPERTY.

FURTHER THE AFFIANT SAYETH NOT.

IN WITNESS WHEREOF, I HEREUNTO SET MY HAND THIS
____ DAY OF ____.

OWNER

SUBSCRIBED AND SWORN TO BEFORE ME THIS ____ DAY
OF ____.

[OFFICIAL TITLE]
MY COMMISSION EXPIRES:
_____[SEAL]"

History. Acts 2015, No. 1242, § 3.

18-27-305. Limitations on the purchase, maintenance, and disposition of personal property — Defacing identifiable stolen personal property.

A dealer shall not:

- (1) Purchase or receive personal property as security from a person under eighteen (18) years of age who has not been emancipated under § 9-26-104; or
- (2) Deface identifiable stolen personal property.

History. Acts 2015, No. 1242, § 3.

18-27-306. Penalties.

A violation of this subchapter by a dealer is a Class C misdemeanor.

History. Acts 2015, No. 1242, § 3.

CHAPTER 28
UNCLAIMED PROPERTY

- SUBCHAPTER.
- 1. GENERAL PROVISIONS.
 - 2. UNCLAIMED PROPERTY ACT.
 - 3. ACTIONS INVOLVING OTHER STATES. [REPEALED.]
 - 4. MINERAL PROCEEDS.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

18-28-101. Abandonment of property
with service or repair
shops — Disposition.

jeweler or merchant for
service, repair, or on con-
signment — Disposition.

18-28-102. Abandonment of jewelry with

18-28-101. Abandonment of property with service or repair shops — Disposition.

(a) Any item of clothing left at a dry cleaners which is not claimed within six (6) months shall be deemed abandoned property, and the owner may dispose of the clothing and may retain the proceeds from any sale of the clothing.

(b)(1) Any audio or video equipment left at a business engaged in the servicing or repair of the equipment shall be deemed abandoned property if the owner of the equipment does not claim the property within six (6) months after the equipment was serviced or repaired or, if no repair or servicing was authorized, then six (6) months after the date the equipment was left at the business.

(2) The owner of the business may dispose of the abandoned property and retain the proceeds from any sale of the equipment.

(c) An owner of a business who disposes of property pursuant to this section shall waive all rights to recover fees for performing work on the object.

History. Acts 1989, No. 799, § 1; 1991, No. 98, § 1.

A.C.R.C. Notes. This section was formerly codified as § 18-16-109.

Publisher's Notes. Acts 1989, No. 799, § 2, provided that this act shall be supplemental to all other laws and shall be

deemed to repeal or modify only those laws in direct conflict with it.

Acts 1991, No. 98, § 2, provided: "This act shall be supplemental to all other laws and shall be deemed to repeal or modify only those laws in direct conflict with it."

18-28-102. Abandonment of jewelry with jeweler or merchant for service, repair, or on consignment — Disposition.

(a) An item of jewelry left with a jeweler or merchant for service or repair or on consignment that is not claimed within one (1) year or by a later time if the later time is specified in writing shall be deemed abandoned property and may be disposed of under this section without recourse by or liability to the party delivering the jewelry, the owner of the jewelry, or any other party.

(b) The jeweler or merchant may dispose of the jewelry if at the time of receiving the jewelry:

(1) The jeweler or merchant gives the party delivering the jewelry notice in writing that:

(A) The jeweler or merchant may dispose of the jewelry without any liability or accountability to the party delivering the jewelry, the owner of the jewelry, or any other party unless the jewelry is

reclaimed within one (1) year or by a later time if the later time is specified by the parties in writing; and

(B) The party delivering the jewelry, the owner of the jewelry, or any other interested party must supply to the jeweler or merchant a current mailing address in order to receive notice of a sale or other disposition of the property after one (1) year or by a later time if the later time is specified by the parties in writing; and

(2) The jeweler or merchant receives a current mailing address from the party delivering the jewelry and, if different, the owner of the jewelry.

(c)(1) Notice that the jewelry is deemed abandoned under this section shall be sent by certified mail to each current mailing address that has been supplied to the jeweler or merchant at least fifteen (15) days prior to the sale or other disposition of the jewelry, or a different time period if agreed to by the parties in writing.

(2) The failure of the party delivering the jewelry, the owner of the jewelry, or any other interested party to supply a current mailing address in order to receive notice of the sale or other disposition of the jewelry is a waiver of any right, claim, or interest in the jewelry.

(d)(1) A jeweler or merchant that disposes of jewelry under this section shall apply the proceeds from the sale or other disposition of the jewelry to:

(A) A reasonable handling charge of the jeweler or merchant, not to exceed fifty dollars (\$50.00); and

(B) The indebtedness owed to the jeweler or merchant for repairs or services performed in connection with the jewelry.

(2) Any proceeds that exceed the amount necessary to make the jeweler or merchant whole under subdivision (d)(1) of this section shall be treated as unclaimed property and reported and paid to the Auditor of State under the Unclaimed Property Act, § 18-28-201 et seq.

History. Acts 2009, No. 652, § 1.

SUBCHAPTER 2 — UNCLAIMED PROPERTY ACT

SECTION.	SECTION.
18-28-201. Definitions.	18-28-209. Notice and publication of lists of abandoned property.
18-28-202. Presumptions of abandonment.	18-28-210. Custody by state — Recovery by holder — Defense of holder.
18-28-203. Contents of safe deposit box or other safekeeping depository.	18-28-211. Crediting of dividends, interest, and increments to owner's account.
18-28-204. Rules for taking custody.	18-28-212. Public sale of abandoned property.
18-28-205. Dormancy charge.	18-28-213. Deposit of funds.
18-28-206. Burden of proof as to property evidenced by record of check or draft.	18-28-214. Claim of another state to recover property.
18-28-207. Report of abandoned property.	18-28-215. Filing claim with administra-
18-28-208. Payment or delivery of abandoned property.	

SECTION.

- tor — Handling of claims by administrator.
- 18-28-216. Action to establish claim.
- 18-28-217. Election to take payment or delivery.
- 18-28-218. Destruction or disposition of property having no substantial commercial value — Immunity from liability.
- 18-28-219. Periods of limitation.
- 18-28-220. Requests for reports and examination of records.
- 18-28-221. Retention of records.
- 18-28-222. Enforcement.

SECTION.

- 18-28-223. Interstate agreements and cooperation — Joint and reciprocal actions with other states.
- 18-28-224. Interest and penalties.
- 18-28-225. Agreement to locate property.
- 18-28-226. Foreign transactions.
- 18-28-227. Transitional provisions.
- 18-28-228. Rules.
- 18-28-229. Uniformity of application and construction.
- 18-28-230. Periods of limitation not a bar.
- 18-28-231. Escheatment — United States savings bond.

A.C.R.C. Notes. As enacted by Acts 1999, No. 850, this subchapter principally follows the Uniform Unclaimed Property Act of 1995.

Publisher's Notes. For Comments regarding the former Revised Uniform Disposition of Unclaimed Property Act, see Commentaries Volume B.

Former subchapter 2, the Uniform Disposition of Unclaimed Property Act, except for § 18-28-216, was repealed by Acts 1999, No. 850, § 33. The subchapter was derived from the following sources:

18-28-201. Acts 1979, No. 256, § 1; 1985, No. 780, § 2; A.S.A. 1949, § 50-620; Acts 1987, No. 696, § 1; 1991, No. 1245, § 2; 1993, No. 1153, § 1; 1999, No. 720, §§ 1, 2.

18-28-202. Acts 1979, No. 256, § 2; A.S.A. 1947, § 50-621; Acts 1993, No. 1153, § 2.

18-28-203. Acts 1979, No. 256, § 3; A.S.A. 1947, § 50-622; Acts 1993, No. 1153, § 3.

18-28-204. Acts 1979, No. 256, § 4; A.S.A. 1947, § 50-623; Acts 1993, No. 1153, § 4.

18-28-205. Acts 1979, No. 256, § 5; A.S.A. 1947, § 50-624; Acts 1987, No. 696, § 2; 1993, No. 1153, § 5.

18-28-206. Acts 1979, No. 256, § 6; A.S.A. 1947, § 50-625.

18-28-207. Acts 1979, No. 256, § 7; A.S.A. 1947, § 50-626; Acts 1993, No. 1153, § 6.

18-28-208. Acts 1979, No. 256, § 8; A.S.A. 1947, § 50-627; Acts 1991, No. 1245, § 1; 1992 (1st Ex. Sess.), No. 7, § 1; 1993, No. 1153, § 7; 1997, No. 1048, § 1.

18-28-209. Acts 1979, No. 256, § 9;

A.S.A. 1947, § 50-628; Acts 1993, No. 1153, § 8.

18-28-210. Acts 1979, No. 256, § 10; A.S.A. 1947, § 50-629.

18-28-211. Acts 1979, No. 256, § 11; 1983, No. 827, § 1; 1985, No. 780, § 3; A.S.A. 1947, § 50-630.

18-28-212. Acts 1979, No. 256, § 12; 1981, No. 67, § 1; 1985, No. 780, § 4; A.S.A. 1947, § 50-631; Acts 1987, No. 696, § 3; 1991, No. 786, § 29; 1993, No. 1153, § 9; 1995, No. 816, § 1.

18-28-213. Acts 1979, No. 256, § 13; 1985, No. 780, § 5; A.S.A. 1947, § 50-632; Acts 1993, No. 1153, § 10.

18-28-214. Acts 1979, No. 256, § 14; 1985, No. 780, § 6; A.S.A. 1947, § 50-633.

18-28-215. Not adopted in Arkansas.

18-28-216. Transferred to present § 18-28-230.

18-28-217. Acts 1979, No. 256, § 16; 1985, No. 780, § 8; A.S.A. 1947, § 50-635; Acts 1987, No. 696, § 4; 1995, No. 816, § 2.

18-28-218. Acts 1979, No. 256, § 17; 1985, No. 780, § 9; A.S.A. 1947, § 50-636; Acts 1987, No., 696, § 5; 1989 (1st Ex. Sess.), No. 173, § 5; 1991, No. 130, § 5.

18-28-219. Acts 1979, No. 256, § 18; 1985, No. 780, § 10; A.S.A. 1947, § 50-637.

18-28-220. Acts 1979, No. 256, § 19; 1981, No. 67, § 2; 1985, No. 780, § 11; A.S.A. 1947, § 50-638; Acts 1987, No. 696, § 6; 1993, No. 1153, § 11.

18-28-221. Acts 1979, No. 256, § 20; 1985, No. 780, § 12; A.S.A. 1947, § 50-639.

18-28-222. Acts 1979, No. 256, § 21; 1985, No. 780, § 13; A.S.A. 1947, § 50-640.

18-28-223. Acts 1979, No. 256, § 22; 1985, No. 780, § 14; A.S.A. 1947, § 50-641.

18-28-224. Acts 1979, No. 256, § 23; 1985, No. 780, § 15; A.S.A. 1947, § 50-642.

18-28-225. Acts 1979, No. 256, § 24; 1985, No. 780, § 16; A.S.A. 1947, § 50-643; Acts 1997, No. 1048, § 2.

18-28-226. Acts 1979, No. 256, § 25; 1985, No. 780, § 17; A.S.A. 1947, § 50-644.

18-28-227. Acts 1979, No. 256, § 26; A.S.A. 1947, § 50-645.

18-28-228. Not adopted in Arkansas.

18-28-229. Acts 1979, No. 256, § 27; A.S.A. 1947, § 50-646.

18-28-230. Acts 1979, No. 256, § 28; A.S.A. 1947, § 50-647.

18-28-231. Acts 1979, No. 256, § 29.

18-28-232. Acts 1979, No. 256, § 30; A.S.A. 1947, § 50-647n.

18-28-233. Acts 1993, No. 1153, § 13.

The 1999 amendment of § 18-28-201 by Acts 1999, No. 720, was deemed superseded by the repeal of this subchapter by Acts 1999, No. 850.

Cross References. Museum Property Act, § 13-5-1001 et seq.

Effective Dates. Acts 1985, No. 780, § 22; Apr. 3, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that passage of this Act is necessary to enable the Auditor of the State of Arkansas to fully discharge the financial obligations of the State of Arkansas concerning the Uniform Unclaimed Property Act. Therefore, an emergency is hereby declared to exist, and this Act, being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1997, No. 104, § 5; Feb. 6, 1997. Emergency clause provided: "It is hereby found and determined by the General As-

sembly that the present laws relating to abandonment of property and the disposition of abandoned property are unclear in certain areas and unless clarified immediately could result in undesirable forfeitures of property and that this act is designed to correct this undesirable situation and should be given effect immediately. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 2003, No. 491, § 3; Mar. 18, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that under the current provisions of the Uniform Disposition of Unclaimed Property Act, there is no specific provision addressing unclaimed property distributed as a result of the demutualization of an insurance company; that this act is immediately necessary because it will facilitate the collection of that property during fiscal year 2003 by expanding the scope of insurance companies required to file unclaimed property reports on May 1, 2003. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of State Statutes Implementing the Uniform Unclaimed Property Act or its Predecessor — Modern Status. 29 A.L.R.6th 507.

Am. Jur. 1 Am. Jur. 2d, Aband. Prop., § 1 et seq.

Ark. L. Rev. Leflar, Conflict of Laws: Arkansas, 1978-82, 36 Ark. L. Rev. 191.

Ark. L. Notes. Kilpatrick, Leftover

Trust Funds: What Do You Do? 1998 Ark. L. Notes 33.

U. Ark. Little Rock L.J. DeSimone,

Survey of Property Law, 3 U. Ark. Little Rock L.J. 286.

CASE NOTES

Recovery by State.

Where the state brought an action against a city to recover unclaimed utility deposits, the city was properly allowed a credit against the state's recovery for the cost to the city of its employees' working hours in determining the total amount of

the deposits since this subchapter imposed a financial burden on the city which it would not have incurred had the law not been passed. Arkansas Dep't of Fin. & Admin. v. City of N. Little Rock, 280 Ark. 512, 659 S.W.2d 937 (1983).

18-28-201. Definitions.

In this subchapter:

(1) "Administrator" means the Auditor of State.

(2) "Apparent owner" means a person whose name appears on the records of a holder as the person entitled to property held, issued, or owing by the holder.

(3) "Business association" means a corporation, joint stock company, investment company, partnership, unincorporated association, joint venture, limited liability company, business trust, trust company, land bank, safe deposit company, safekeeping depository, financial organization, insurance company, mutual fund, utility, or other business entity consisting of one (1) or more persons, whether or not for profit.

(4) "Domicile" means the state of incorporation of a corporation and the state of the principal place of business of a holder other than a corporation.

(5) "Financial organization" means a savings and loan association, building and loan association, savings bank, industrial bank, bank, banking organization, or credit union.

(6) "Holder" means a person obligated to hold for the account of, or deliver or pay to, the owner property that is subject to this subchapter.

(7) "Insurance company" means an association, corporation, or fraternal or mutual benefit organization, whether or not for profit, engaged in the business of providing life endowments, annuities, or insurance, including accident, burial, casualty, credit life, contract performance, dental, disability, fidelity, fire, health, hospitalization, illness, life, malpractice, marine, mortgage, surety, wage protection, and workers' compensation insurance.

(8) "Mineral" means gas; oil; coal; other gaseous, liquid, and solid hydrocarbons; oil shale; cement material; sand and gravel; road material; building stone; chemical raw material; gemstone; fissionable and nonfissionable ores; colloidal and other clay; steam and other geothermal resource; or any other substance defined as a mineral by the law of this state.

(9) "Mineral proceeds" means amounts payable for the extraction, production, or sale of minerals, or, upon the abandonment of those payments, all payments that become payable thereafter. The term includes amounts payable:

(i) for the acquisition and retention of a mineral lease, including bonuses, royalties, compensatory royalties, shut-in royalties, minimum royalties, and delay rentals;

(ii) for the extraction, production, or sale of minerals, including net revenue interests, royalties, overriding royalties, extraction payments, and production payments; and

(iii) under an agreement or option, including a joint operating agreement, unit agreement, pooling agreement, and farm-out agreement.

(10) "Money order" includes an express money order and a personal money order, on which the remitter is the purchaser. The term does not include a bank money order or any other instrument sold by a financial organization if the seller has obtained the name and address of the payee.

(11) "Owner" means a person who has a legal or equitable interest in property subject to this subchapter or the person's legal representative. The term includes a depositor in the case of a deposit, a beneficiary in the case of a trust other than a deposit in trust, and a creditor, claimant, or payee in the case of other property.

(12) "Person" means an individual, business association, financial organization, estate, trust, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(13)(A) "Property" means tangible property described in § 18-28-203 or a fixed and certain interest in intangible property that is held, issued, or owed in the course of a holder's business, or by a government, governmental subdivision, agency, or instrumentality, and all income or increments therefrom. The term includes property that is referred to as or evidenced by:

(i) Money, a check, draft, deposit, interest, or dividend;

(ii) Credit balance, customer's overpayment, security deposit, refund, credit memorandum, unpaid wage, unused ticket, mineral proceeds, or unidentified remittance;

(iii) Stock or other evidence of ownership of an interest in a business association or financial organization;

(iv) A bond, debenture, note, or other evidence of indebtedness;

(v) Money deposited to redeem stocks, bonds, coupons, or other securities or to make distributions;

(vi) An amount due and payable under the terms of an annuity or insurance policy, including policies providing life insurance, property and casualty insurance, workers' compensation insurance, or health and disability insurance; and

(vii) An amount distributable from a trust or custodial fund established under a plan to provide health, welfare, pension, vacation, severance, retirement, death, stock purchase, profit sharing,

employee savings, supplemental unemployment insurance, or similar benefits.

(B) "Property" does not include:

(i) gift certificates, gift cards, in-store merchandise credits, or layaway accounts issued or maintained by a person in the business of selling tangible personal property at retail;

(ii) a patronage dividend, capital credit, customer deposit, or nonnegotiated payment check that does not exceed one hundred dollars (\$100) held or owing by an agricultural farm supply cooperative association organized under the laws of this state; or

(iii) funds distributable from a trust or custodial account established by a State of Arkansas-supported retirement system administered by an agency of the State of Arkansas under a plan to provide a defined benefit pension plan that is qualified for tax deferral under the income tax laws of the state.

(14) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(15) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

(16) "Utility" means persons and corporations, or their lessees, trustees, and receivers, owning or operating in this state equipment or facilities as provided in § 23-1-101.

History. Acts 1999, No. 850, § 1; 2009, No. 1174, § 1; 2013, No. 86, § 1.

Amendments. The 2013 amendment added (13)(B)(iii).

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of State Statutes Implementing the Uniform Unclaimed Property Act or its Predecessor — Modern Status. 29 A.L.R.6th 507.

Ark. L. Rev. Carroll, Uniform Laws in Arkansas, 52 Ark. L. Rev. 313.

18-28-202. Presumptions of abandonment.

(a) Property is presumed abandoned if it is unclaimed by the apparent owner during the time stated below for the particular property:

(1) Traveler's check, fifteen (15) years after issuance;

(2) Money order, seven (7) years after issuance;

(3) Stock or other equity interest in a business association or financial organization, including a security entitlement under § 4-8-101 et seq. (UCC — Investment Securities), five (5) years after the earlier of:

(A) The date of the most recent dividend, stock split, or other distribution unclaimed by the apparent owner; or

(B) The date of the second mailing of a statement of account or other notification or communication that was returned as undeliverable or after the holder discontinued mailings, notifications, or communications to the apparent owner;

(4) Debt of a business association or financial organization, other than a bearer bond or an original issue discount bond, three (3) years after the date of the most recent interest payment unclaimed by the apparent owner;

(5) A demand, savings, or time deposit, including a deposit that is automatically renewable, three (3) years after the earlier of maturity or the date of the last indication by the owner of interest in the property; but a deposit that is automatically renewable is not matured for purposes of this section upon its initial date of maturity, unless the most recent correspondence from the financial organization to the owner has been returned unclaimed or undelivered to the financial organization by the postal service;

(6) Money or credits owed to a customer as a result of a retail business transaction, three (3) years after the obligation accrued;

(7) Amount owed by an insurer on a life or endowment insurance policy or an annuity that has matured or terminated, three (3) years after the obligation to pay arose or, in the case of a policy or annuity payable upon proof of death, three (3) years after the insured has attained, or would have attained if living, the limiting age under the mortality table on which the reserve is based;

(8) Property distributable by a business association or financial organization in a course of dissolution, one (1) year after the property becomes distributable;

(9) Property received by a court as proceeds of a class action, and not distributed pursuant to the judgment, one (1) year after the distribution date;

(10) Property held by a court, government, governmental subdivision, agency, or instrumentality, one (1) year after the property becomes distributable;

(11) Wages or other compensation for personal services, one (1) year after the compensation becomes payable;

(12) Deposit or refund owed to a subscriber by a utility, one (1) year after the deposit or refund becomes payable;

(13) Property in an individual retirement account, defined benefit plan, or other account or plan that is qualified for tax deferral under the income tax laws of the United States, three (3) years after the earliest of the date of the distribution or attempted distribution of the property, the date of the required distribution as stated in the plan or trust agreement governing the plan, or the date, if determinable by the holder, specified in the income tax laws of the United States by which distribution of the property must begin in order to avoid a tax penalty;

(14) All other property, three (3) years after the owner's right to demand the property or after the obligation to pay or distribute the property arises, whichever first occurs; and

(15) Unclaimed property payable or distributable in the course of a demutualization of an insurance company three (3) years after the earlier of:

(A) The date of last contact with the policy holder; or

(B) The date the property became payable or distributable.

(b) At the time that an interest is presumed abandoned under subsection (a), any other property right accrued or accruing to the owner as a result of the interest, and not previously presumed abandoned, is also presumed abandoned.

(c) Property is unclaimed if, for the applicable period set forth in subsection (a), the apparent owner has not communicated in writing or by other means reflected in a contemporaneous record prepared by or on behalf of the holder, with the holder concerning the property or the account in which the property is held, and has not otherwise indicated an interest in the property. A communication with an owner by a person other than the holder or its representative who has not in writing identified the property to the owner is not an indication of interest in the property by the owner.

(d) An indication of an owner's interest in property includes:

(i) the presentment of a check or other instrument of payment of a dividend or other distribution made with respect to an account or underlying stock or other interest in a business association or financial organization or, in the case of a distribution made by electronic or similar means, evidence that the distribution has been received;

(ii) owner-directed activity in the account in which the property is held, including a direction by the owner to increase, decrease, or change the amount or type of property held in the account;

(iii) the making of a deposit to or withdrawal from a bank account;

(iv) correspondence from the financial organization to the owner of the property by mail, which correspondence has not been returned unclaimed or undelivered to the financial organization by the postal service; and

(v) the payment of a premium with respect to a property interest in an insurance policy; but the application of an automatic premium loan provision or other nonforfeiture provision contained in an insurance policy does not prevent a policy from maturing or terminating if the insured has died or the insured or the beneficiary of the policy has otherwise become entitled to the proceeds before the depletion of the cash surrender value of a policy by the application of those provisions.

(e) Property is payable or distributable for purposes of this subchapter notwithstanding the owner's failure to make demand or present an instrument or document otherwise required to obtain payment.

History. Acts 1999, No. 850, § 2; 2001, No. 793, §§ 1, 2; 2003, No. 491, § 1; 2015, No. 1039, § 1.

Amendments. The 2015 amendment

substituted "three (3) years" for "five (5) years" in (a)(4), (a)(5), (a)(14), and (a)(15); substituted "stated" for "set forth" in the introductory language of (a); redesignated

(a)(3)(i) and (ii) as (a)(3)(A) and (B); and substituted “is not” for “shall not be deemed” in (a)(5).

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of assembly, Property Law, 24 U. Ark. Little Legislation, 2001 Arkansas General As- Rock L. Rev. 549.

18-28-203. Contents of safe deposit box or other safekeeping depository.

Tangible property held in a safe deposit box or other safekeeping depository in this state in the ordinary course of the holder’s business and proceeds resulting from the sale of the property permitted by other law, are presumed abandoned if the property remains unclaimed by the owner for more than five (5) years after expiration of the lease or rental period on the box or other depository.

History. Acts 1999, No. 850, § 3.

18-28-204. Rules for taking custody.

Except as otherwise provided in this subchapter or by other statute of this state, property that is presumed abandoned, whether located in this or another state, is subject to the custody of this state if:

(1) the last known address of the apparent owner, as shown on the records of the holder, is in this state;

(2) the records of the holder do not reflect the identity of the person entitled to the property and it is established that the last known address of the person entitled to the property is in this state;

(3) the records of the holder do not reflect the last known address of the apparent owner and it is established that:

(i) the last known address of the person entitled to the property is in this state; or

(ii) the holder is domiciled in this state or is a government or governmental subdivision, agency, or instrumentality of this state and has not previously paid or delivered the property to the state of the last known address of the apparent owner or other person entitled to the property;

(4) the last known address of the apparent owner, as shown on the records of the holder, is in a state that does not provide for the escheat or custodial taking of the property and the holder is domiciled in this state or is a government or governmental subdivision, agency, or instrumentality of this state;

(5) the last known address of the apparent owner, as shown on the records of the holder, is in a foreign country and the holder is domiciled in this state or is a government or governmental subdivision, agency, or instrumentality of this state;

(6) the transaction out of which the property arose occurred in this state, the holder is domiciled in a state that does not provide for the

escheat or custodial taking of the property, and the last known address of the apparent owner or other person entitled to the property is unknown or is in a state that does not provide for the escheat or custodial taking of the property; or

(7) the property is a traveler's check or money order purchased in this state, or the issuer of the traveler's check or money order has its principal place of business in this state and the issuer's records show that the instrument was purchased in a state that does not provide for the escheat or custodial taking of the property, or do not show the state in which the instrument was purchased.

History. Acts 1999, No. 850, § 4.

18-28-205. Dormancy charge.

A holder may deduct from property presumed abandoned a charge imposed by reason of the owner's failure to claim the property within a specified time only if there is a valid and enforceable written contract between the holder and the owner under which the holder may impose the charge and the holder regularly imposes the charge, which is not regularly reversed or otherwise canceled. The amount of the deduction is limited to an amount that is not unconscionable.

History. Acts 1999, No. 850, § 5.

18-28-206. Burden of proof as to property evidenced by record of check or draft.

A record of the issuance of a check, draft, or similar instrument is prima facie evidence of an obligation. In claiming property from a holder who is also the issuer, the administrator's burden of proof as to the existence and amount of the property and its abandonment is satisfied by showing issuance of the instrument and passage of the requisite period of abandonment. Defenses of payment, satisfaction, discharge, and want of consideration are affirmative defenses that must be established by the holder.

History. Acts 1999, No. 850, § 6.

18-28-207. Report of abandoned property.

(a) A holder of property presumed abandoned shall make a report to the administrator concerning the property.

(b) The report must be verified and must contain:

(1) a description of the property;

(2) except with respect to a traveler's check or money order, the name, if known, and last known address, if any, and the social security number or taxpayer identification number, if readily ascertainable, of the apparent owner of property of the value of fifty dollars (\$50.00) or more;

(3) an aggregated amount of items valued under fifty dollars (\$50.00) each;

(4) in the case of an amount of fifty dollars (\$50.00) or more held or owing under an annuity or a life or endowment insurance policy, the full name and last known address of the annuitant or insured and of the beneficiary;

(5) in the case of property held in a safe deposit box or other safekeeping depository, an indication of the place where it is held and where it may be inspected by the administrator, and any amounts owing to the holder;

(6) the date, if any, on which the property became payable, demandable, or returnable, and the date of the last transaction with the apparent owner with respect to the property; and

(7) other information that the administrator by rule prescribes as necessary for the administration of this subchapter.

(c) If a holder of property presumed abandoned is a successor to another person who previously held the property for the apparent owner or the holder has changed its name while holding the property, the holder shall file with the report its former names, if any, and the known names and addresses of all previous holders of the property.

(d) The report must be filed before November 1 of each year and cover the twelve (12) months next preceding July 1 of that year, but a report with respect to a life insurance company, including the report and remittance of unclaimed insurance company demutualization proceeds made under § 18-28-202(a)(15), must be filed before May 1 of each year for the calendar year next preceding.

(e) The holder of property presumed abandoned shall send written notice to the apparent owner, not more than one hundred twenty (120) days or less than sixty (60) days before filing the report, stating that the holder is in possession of property subject to this subchapter, if:

(1) the holder has in its records an address for the apparent owner which the holder's records do not disclose to be inaccurate;

(2) the claim of the apparent owner is not barred by a statute of limitations; and

(3) the value of the property is fifty dollars (\$50.00) or more.

(f) Before the date for filing the report, the holder of property presumed abandoned may request the administrator to extend the time for filing the report. The administrator may grant the extension for good cause. The holder, upon receipt of the extension, may make an interim payment on the amount the holder estimates will ultimately be due, which terminates the accrual of additional interest on the amount paid.

(g) The holder of property presumed abandoned shall file with the report an affidavit stating that the holder has complied with subsection (e).

18-28-208. Payment or delivery of abandoned property.

(a) Except for property held in a safe deposit box or other safekeeping depository, upon filing the report required by § 18-28-207, the holder of property presumed abandoned shall pay, deliver, or cause to be paid or delivered to the administrator the property described in the report as unclaimed, but if the property is an automatically renewable deposit, and a penalty or forfeiture in the payment of interest would result, the time for compliance is extended until a penalty or forfeiture would no longer result. Tangible property held in a safe deposit box or other safekeeping depository may not be delivered to the administrator until one hundred twenty (120) days after filing the report required by § 18-28-207.

(b) If the property reported to the administrator is a security or security entitlement under § 4-8-101 et seq. (UCC — Investment Securities), the administrator is an appropriate person to make an indorsement, instruction, or entitlement order on behalf of the apparent owner to invoke the duty of the issuer or its transfer agent or the securities intermediary to transfer or dispose of the security or the security entitlement in accordance with § 4-8-101 et seq. (UCC — Investment Securities).

(c) If the holder of property reported to the administrator is the issuer of a certificated security, the administrator has the right to obtain a replacement certificate pursuant to § 4-8-405, but an indemnity bond is not required.

(d) An issuer, the holder, and any transfer agent or other person acting pursuant to the instructions of and on behalf of the issuer or holder in accordance with this section is not liable to the apparent owner and must be indemnified against claims of any person in accordance with § 18-28-210.

History. Acts 1999, No. 850, § 8.

18-28-209. Notice and publication of lists of abandoned property.

The administrator shall publish a notice not later than November 30 of the year next following the year in which abandoned property has been paid or delivered to the administrator. The notice must be published in a newspaper of general circulation in each county of this state. The advertisement must be in a form that, in the judgment of the administrator, is likely to attract the attention of the potential owners of the unclaimed property. The advertisement shall contain:

(1) A statement explaining that the property the administrator is holding is presumed to be abandoned and has been taken into the protective custody of the administrator;

(2)(A) A statement explaining that additional information concerning the property may be obtained by consulting one (1) or more of the following:

(i) The Internet address of the administrator's official website;

- (ii) The telephone number for the administrator's office; and
- (iii) Posting of a notice at the county courthouse.

(B) A statement under this subdivision (a)(2) shall include the:

- (i) Internet address of the administrator's official website; and
- (ii) Telephone number for the administrator's office; and

(3) A statement that information about the property and its return to the owner is available to a person having a legal or beneficial interest in the property, upon request to the administrator.

History. Acts 1999, No. 850, § 9; 2015, No. 592, § 1.

Amendments. The 2015 amendment, in the introductory language, substituted "each county of this state" for "the county of this state in which is located the last known address of any person named in the notice. If a holder does not report an address for the apparent owner, or the address is outside the state, the notice must be published in the county in which the holder has its principal place of busi-

ness within this state or another county that the administrator reasonably selects", substituted "potential owners" for "apparent owner", and substituted "advertisement shall" for "form must" near the end; deleted (a)(1) and (2), redesignated former (a)(3) as (a)(1) and redesignated former (a)(4) as (a)(3); substituted "the property the administrator is holding" for "property of the owner" in present (a)(1); inserted (a)(2); and deleted (b).

18-28-210. Custody by state — Recovery by holder — Defense of holder.

(a) In this section, payment or delivery is made in "good faith" if:

(1) payment or delivery was made in a reasonable attempt to comply with this subchapter;

(2) the holder was not then in breach of a fiduciary obligation with respect to the property and had a reasonable basis for believing, based on the facts then known, that the property was presumed abandoned; and

(3) there is no showing that the records under which the payment or delivery was made did not meet reasonable commercial standards of practice.

(b) Upon payment or delivery of property to the administrator, the state assumes custody and responsibility for the safekeeping of the property. A holder who pays or delivers property to the administrator in good faith is relieved of all liability arising thereafter with respect to the property.

(c) A holder who has paid money to the administrator pursuant to this subchapter may subsequently make payment to a person reasonably appearing to the holder to be entitled to payment. Upon a filing by the holder of proof of payment and proof that the payee was entitled to the payment, the administrator shall promptly reimburse the holder for the payment without imposing a fee or other charge. If reimbursement is sought for a payment made on a negotiable instrument, including a traveler's check or money order, the holder must be reimbursed upon filing proof that the instrument was duly presented and that payment was made to a person who reasonably appeared to be entitled to payment. The holder must be reimbursed for payment made even if the

payment was made to a person whose claim was barred under § 18-28-219(a).

(d) A holder who has delivered property other than money to the administrator pursuant to this subchapter may reclaim the property if it is still in the possession of the administrator, without paying any fee or other charge, upon filing proof that the apparent owner has claimed the property from the holder.

(e) The administrator may accept a holder's affidavit as sufficient proof of the holder's right to recover money and property under this section.

(f) If a holder pays or delivers property to the administrator in good faith and thereafter another person claims the property from the holder or another state claims the money or property under its laws relating to escheat or abandoned or unclaimed property, the administrator, upon written notice of the claim, shall defend the holder against the claim and indemnify the holder against any liability on the claim resulting from payment or delivery of the property to the administrator.

(g) Property removed from a safe deposit box or other safekeeping depository is received by the administrator subject to the holder's right to be reimbursed for the cost of the opening and to any valid lien or contract providing for the holder to be reimbursed for unpaid rent or storage charges. The administrator shall reimburse the holder out of the proceeds remaining after deducting the expense incurred by the administrator in selling the property.

History. Acts 1999, No. 850, § 10.

18-28-211. Crediting of dividends, interest, and increments to owner's account.

If property other than money is delivered to the administrator under this subchapter, the owner is entitled to receive from the administrator any income or gain realized or accruing on the property at or before liquidation or conversion of the property into money. If the property was an interest-bearing demand, savings, or time deposit, including a deposit that is automatically renewable, the administrator shall not pay interest.

History. Acts 1999, No. 850, § 11;
2005, No. 175, § 1.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of assembly, Property Law, 28 U. Ark. Little Rock L. Rev. 385.
Legislation, 2005 Arkansas General As-

18-28-212. Public sale of abandoned property.

(a)(1) Except as otherwise provided in this section, the administrator, within three (3) years after the receipt of abandoned property, shall sell it to the highest bidder at public sale at a location in the state which in the judgment of the administrator affords the most favorable market for the property. The administrator may decline the highest bid and reoffer the property for sale if the administrator considers the bid to be insufficient. The administrator need not offer the property for sale if the administrator considers that the probable cost of sale will exceed the proceeds of the sale.

(2) A sale held under this section must be preceded by a single publication of notice, at least three (3) weeks before sale, in a newspaper of general circulation in the county in which the property is to be sold. However, the administrator is not required to publish notice under this section if the abandoned property will be sold through an Internet auction.

(b) Securities listed on an established stock exchange must be sold at prices prevailing on the exchange at the time of sale. Other securities may be sold over the counter at prices prevailing at the time of sale or by any reasonable method selected by the administrator. If securities are sold by the administrator before the expiration of three (3) years after their delivery to the administrator, a person making a claim under this subchapter before the end of the three-year period is entitled to the proceeds of the sale of the securities or the market value of the securities at the time the claim is made, whichever is greater, plus dividends, interest, and other increments thereon up to the time the claim is made, less any deduction for expenses of sale. A person making a claim under this subchapter after the expiration of the three-year period is entitled to receive the securities delivered to the administrator by the holder, if they still remain in the custody of the administrator, or the net proceeds received from sale, and is not entitled to receive any appreciation in the value of the property occurring after delivery to the administrator, except in a case of intentional misconduct or malfeasance by the administrator.

(c) A purchaser of property at a sale conducted by the administrator pursuant to this subchapter takes the property free of all claims of the owner or previous holder and of all persons claiming through or under them. The administrator shall execute all documents necessary to complete the transfer of ownership.

History. Acts 1999, No. 850, § 12;
2005, No. 175, § 2.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of ssembly, Property Law, 28 U. Ark. Little
Legislation, 2005 Arkansas General As- Rock L. Rev. 385.

18-28-213. Deposit of funds.

(a) All funds received under this subchapter, including the proceeds from the sale of abandoned property, shall be deposited by the administrator into a special trust fund to be known as the "Unclaimed Property Proceeds Trust Fund", from which he or she shall make prompt payment of claims duly allowed by him or her as hereinafter provided. Such funds shall be deposited into accounts in one (1) or more financial institutions authorized to do business in this state to be administered in accordance with the laws of this state pertaining to the appropriation, administration, and expenditure of cash funds. Before making the deposit, he or she shall record the name and last known address of each person appearing from the holder's reports to be entitled to the abandoned property, and the name and last known address of each insured or annuitant, and, with respect to each policy or contract listed in the report of a life insurance corporation, its number, the name of the corporation, and the amount due. The record shall be available for public inspection at all reasonable business hours.

(b) At the end of each fiscal year, the administrator shall withdraw from the Unclaimed Property Proceeds Trust Fund an amount necessary to reimburse the State Central Services Fund, or its successor fund or fund account, for moneys expended for personal services and operating expenses of administering and enforcing this subchapter.

(c)(1)(A)(i) At least one (1) time each fiscal year, the administrator shall transfer to the treasurer of the reporting county all funds collected from that county that have not been claimed and that have been held for a full three (3) years.

(ii) The funds received by the treasurer shall be deposited into the general fund of the reporting county.

(iii) The reporting county may use the funds for any purpose for which it may use general revenues.

(B)(i) After the administrator returns funds to the county, the state is released from its indemnity of the county under § 18-28-210(b) and (f).

(ii) The county receiving the funds shall maintain an accounting of the funds in perpetuity, unless payment upon a valid claim is made.

(iii) If the rightful owner or the owner's heirs or assigns ever appear and petition the county for the return of the funds after providing proof of ownership, the county shall pay the funds to the rightful owner from the general fund of the county.

(iv) For purposes of this section, "proof of ownership" means a finding by a court of competent jurisdiction that the person petitioning the county is, in fact, the rightful owner, heir, or assignee.

(2) At least one (1) time each fiscal year, the administrator shall transfer to the general revenues of the state all remaining funds that have been collected and held for a full three (3) years, less the amount transferred to the State Central Services Fund, or its successor fund or fund account, as required by this subchapter.

(d) Each bank depository of unclaimed property funds shall secure the funds to the extent of the amount of the balance of the funds any time on hand and in such manner as the administrator shall require.

History. Acts 1999, No. 850, § 13; 2001, No. 1261, § 2; 2003, No. 1033, § 1; 2011, No. 616, § 1.

A.C.R.C. Notes. Acts 2012, No. 213, § 10, provided: “FUND TRANSFER. On the effective date of this Act and notwithstanding the provisions of A.C.A. § 18-28-213 (c)(2) regarding the transfer of funds from the Unclaimed Property Proceeds Trust Fund to the general revenues of the state, the Auditor of State shall transfer on his books and those of the State Treasurer and the Chief Fiscal Officer of the State, the sum of one million dollars (\$1,000,000) from the Unclaimed Property Proceeds Trust Fund to the State Central Services Fund as a direct revenue for the Auditor of State to be used exclusively for grants to implement a statewide Enhanced 9-1-1 System.”

Acts 2012, Nos. 271 and 287, § 8, provided: “FUND TRANSFER. Immediately upon the effective date of this Act, and notwithstanding the provisions of A.C.A. 18-28-213 (c)(2) regarding the transfer of funds from the Unclaimed Property Proceeds Trust Fund to the general revenues of the state, the Auditor of State shall transfer on his or her books and those of the State Treasurer and the Chief Fiscal Officer of State the sum of one million five

hundred thousand dollars (\$1,500,000) from the Unclaimed Property Proceeds Trust Fund to the Mid-South Community College Fund to be expensed from the Arkansas Delta Training and Education Consortium, the Arkansas Delta Training and Education Consortium Partners, and the University Center Partners appropriations.”

Acts 2012, Nos. 271 and 287, § 9, provided: “FUND TRANSFER. Immediately upon the effective date of this Act, and notwithstanding the provisions of A.C.A. 18-28-213 (c)(2) regarding the transfer of funds from the Unclaimed Property Proceeds Trust Fund to the general revenues of the state, the Auditor of State shall transfer on his or her books and those of the State Treasurer and the Chief Fiscal Officer of State the sum of one million dollars (\$1,000,000) from the Unclaimed Property Proceeds Trust Fund to the Higher Education Grants Fund Account to provide additional funding for scholarships.”

Amendments. The 2011 amendment inserted “treasurer of the” in (c)(1)(A)(i); added (c)(1)(A)(ii) and (iii); inserted “unless payment upon a valid claim is made” at the end of (c)(1)(B)(ii); and inserted “from the general fund of the county” at the end of (c)(1)(B)(iii).

18-28-214. Claim of another state to recover property.

(a) After property has been paid or delivered to the administrator under this subchapter, another state may recover the property if:

(1) the property was paid or delivered to the custody of this state because the records of the holder did not reflect a last known location of the apparent owner within the borders of the other state and the other state establishes that the apparent owner or other person entitled to the property was last known to be located within the borders of that state and under the laws of that state the property has escheated or become subject to a claim of abandonment by that state;

(2) the property was paid or delivered to the custody of this state because the laws of the other state did not provide for the escheat or custodial taking of the property, and under the laws of that state subsequently enacted the property has escheated or become subject to a claim of abandonment by that state;

(3) the records of the holder were erroneous in that they did not accurately identify the owner of the property and the last known

location of the owner within the borders of another state and under the laws of that state the property has escheated or become subject to a claim of abandonment by that state;

(4) the property was subjected to custody by this state under § 18-28-204(6) and under the laws of the state of domicile of the holder the property has escheated or become subject to a claim of abandonment by that state; or

(5) the property is a sum payable on a traveler's check, money order, or similar instrument that was purchased in the other state and delivered into the custody of this state under § 18-28-204(7), and under the laws of the other state the property has escheated or become subject to a claim of abandonment by that state.

(b) A claim of another state to recover escheated or abandoned property must be presented in a form prescribed by the administrator, who shall decide the claim within ninety (90) days after it is presented. The administrator shall allow the claim upon determining that the other state is entitled to the abandoned property under subsection (a).

(c) The administrator shall require another state, before recovering property under this section, to agree to indemnify this state and its officers and employees against any liability on a claim to the property.

History. Acts 1999, No. 850, § 14.

18-28-215. Filing claim with administrator — Handling of claims by administrator.

(a) A person, excluding another state, claiming property paid or delivered to the administrator may file a claim on a form prescribed by the administrator and verified by the claimant.

(b) Within ninety (90) days after a claim is filed, the administrator shall allow or deny the claim and give written notice of the decision to the claimant. If the claim is denied, the administrator shall inform the claimant of the reasons for the denial and specify what additional evidence is required before the claim will be allowed. The claimant may then file a new claim with the administrator or maintain an action under § 18-28-216.

(c)(1) Except as provided in subdivision (c)(2) of this section, within thirty (30) days after a claim is allowed, the property or the net proceeds of a sale of the property must be delivered or paid by the administrator to the claimant, together with any dividend, interest, or other increment to which the claimant is entitled under §§ 18-28-211 and 18-28-212.

(2) If in order to transfer property to the claimant under this section, fees or costs are required to be paid prior to transfer, the administrator may sell all or a portion of the property and deduct the costs of transfer from the proceeds of the sale, and any proceeds remaining shall be paid to the claimant.

(d) A holder who pays the owner for property that has been delivered to the state and which, if claimed from the administrator by the owner

would be subject to an increment under §§ 18-28-211 and 18-28-212, may recover from the administrator the amount of the increment.

History. Acts 1999, No. 850, § 15; 2005, No. 175, § 3.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Property Law, 28 U. Ark. Little Rock L. Rev. 385.

18-28-216. Action to establish claim.

A person aggrieved by a decision of the administrator or whose claim has not been acted upon within ninety (90) days after its filing may maintain an original action to establish the claim in the Pulaski County Circuit Court, naming the administrator as a defendant. If the aggrieved person establishes the claim in an action against the administrator, the court may award the claimant reasonable attorney's fees.

History. Acts 1999, No. 850, § 16.

A.C.R.C. Notes. Former § 18-28-216 was not repealed by Acts 1999, No. 850, § 33. In light of the enactment of the new subchapter, former § 18-28-216 was recodified as § 18-28-230.

18-28-217. Election to take payment or delivery.

(a) The administrator may decline to receive property reported under this subchapter which the administrator considers to have a value less than the expenses of notice and sale.

(b) A holder, with the written consent of the administrator and upon conditions and terms prescribed by the administrator, may report and deliver property before the property is presumed abandoned. Property so delivered must be held by the administrator and is not presumed abandoned until it otherwise would be presumed abandoned under this subchapter.

History. Acts 1999, No. 850, § 17.

18-28-218. Destruction or disposition of property having no substantial commercial value — Immunity from liability.

If the administrator determines after investigation that property delivered under this subchapter has no substantial commercial value, the administrator may destroy or otherwise dispose of the property at any time. An action or proceeding may not be maintained against the state or any officer or against the holder for or on account of an act of the administrator under this section, except for intentional misconduct or malfeasance.

History. Acts 1999, No. 850, § 18.

18-28-219. Periods of limitation.

(a) The expiration, before or after July 30, 1999, of a period of limitation on the owner's right to receive or recover property, whether specified by contract, statute, or court order, does not preclude the property from being presumed abandoned or affect a duty to file a report or to pay or deliver or transfer property to the administrator as required by this subchapter.

(b) An action or proceeding may not be maintained by the administrator to enforce this subchapter in regard to the reporting, delivery, or payment of property more than ten (10) years after the holder specifically identified the property in a report filed with the administrator or gave express notice to the administrator of a dispute regarding the property. In the absence of such a report or other express notice, the period of limitation is tolled. The period of limitation is also tolled by the filing of a report that is fraudulent.

History. Acts 1999, No. 850, § 19.

18-28-220. Requests for reports and examination of records.

(a) The administrator may require a person who has not filed a report, or a person who the administrator believes has filed an inaccurate, incomplete, or false report, to file a verified report in a form specified by the administrator. The report must state whether the person is holding property reportable under this subchapter, describe property not previously reported or as to which the administrator has made inquiry, and specifically identify and state the amounts of property that may be in issue.

(b) The administrator, at reasonable times and upon reasonable notice, may examine the records of any person to determine whether the person has complied with this subchapter. The administrator may conduct the examination even if the person believes it is not in possession of any property that must be reported, paid, or delivered under this subchapter. The administrator may contract with any other person to conduct the examination on behalf of the administrator.

(c) The administrator at reasonable times may examine the records of an agent, including a dividend disbursing agent or transfer agent, of a business association or financial association that is the holder of property presumed abandoned if the administrator has given the notice required by subsection (b) to both the association or organization and the agent at least ninety (90) days before the examination.

(d) Documents and working papers obtained or compiled by the administrator, or the administrator's agents, employees, or designated representatives, in the course of conducting an examination are confidential and are not public records, but the documents and papers may be:

(1) used by the administrator in the course of an action to collect unclaimed property or otherwise enforce this subchapter;

(2) used in joint examinations conducted with or pursuant to an agreement with another state, the federal government, or any other governmental subdivision, agency, or instrumentality;

(3) produced pursuant to subpoena or court order; or

(4) disclosed to the abandoned property office of another state for that state's use in circumstances equivalent to those described in this subdivision, if the other state is bound to keep the documents and papers confidential.

(e) If an examination of the records of a person results in the disclosure of property reportable under this subchapter, the administrator may assess the cost of the examination against the holder at the rate of two hundred dollars (\$200) a day for each examiner, or a greater amount that is reasonable and was incurred, but the assessment may not exceed the value of the property found to be reportable. The cost of an examination made pursuant to subsection (c) may be assessed only against the business association or financial organization.

(f) If, after July 30, 1999, a holder does not maintain the records required by § 18-28-221 and the records of the holder available for the periods subject to this subchapter are insufficient to permit the preparation of a report, the administrator may require the holder to report and pay to the administrator the amount the administrator reasonably estimates, on the basis of any available records of the holder or by any other reasonable method of estimation, should have been but was not reported.

History. Acts 1999, No. 850, § 20.

18-28-221. Retention of records.

(a) Except as otherwise provided in subsection (b), a holder required to file a report under § 18-28-207 shall maintain the records containing the information required to be included in the report for ten (10) years after the holder files the report, unless a shorter period is provided by rule of the administrator.

(b) A business association or financial organization that sells, issues, or provides to others for sale or issue in this state, traveler's checks, money orders, or similar instruments other than third-party bank checks, on which the business association or financial organization is directly liable, shall maintain a record of the instruments while they remain outstanding, indicating the state and date of issue, for three (3) years after the holder files the report.

History. Acts 1999, No. 850, § 21.

18-28-222. Enforcement.

The administrator may maintain an action in this or another state to enforce this subchapter. The court may award reasonable attorney's fees to the prevailing party.

History. Acts 1999, No. 850, § 22.

18-28-223. Interstate agreements and cooperation — Joint and reciprocal actions with other states.

(a) The administrator may enter into an agreement with another state to exchange information relating to abandoned property or its possible existence. The agreement may permit the other state, or another person acting on behalf of a state, to examine records as authorized in § 18-28-220. The administrator by rule may require the reporting of information needed to enable compliance with an agreement made under this section and prescribe the form.

(b) The administrator may join with another state to seek enforcement of this subchapter against any person who is or may be holding property reportable under this subchapter.

(c) At the request of another state, the Attorney General of this state may maintain an action on behalf of the other state to enforce, in this state, the unclaimed property laws of the other state against a holder of property subject to escheat or a claim of abandonment by the other state, if the other state has agreed to pay expenses incurred by the Attorney General in maintaining the action.

(d) The administrator may request that the attorney general of another state or another attorney commence an action in the other state on behalf of the administrator. With the approval of the Attorney General of this state, the administrator may retain any other attorney to commence an action in this state on behalf of the administrator. This state shall pay all expenses, including attorney's fees, in maintaining an action under this subsection. With the administrator's approval, the expenses and attorney's fees may be paid from money received under this subchapter. The administrator may agree to pay expenses and attorney's fees based in whole or in part on a percentage of the value of any property recovered in the action. Any expenses or attorney's fees paid under this subsection may not be deducted from the amount that is subject to the claim by the owner under this subchapter.

History. Acts 1999, No. 850, § 23.

18-28-224. Interest and penalties.

(a) A holder who fails to report, pay, or deliver property within the time prescribed by this subchapter shall pay to the administrator interest at the annual rate of two (2) percentage points above the bank prime loan rate as reported from time to time in the Board of Governors of the Federal Reserve System statistical release H.15 (Selected Interest Rates) or any successor publication on the property or value thereof from the date the property should have been reported, paid or delivered.

(b) Except as otherwise provided in subsection (c), a holder who fails to report, pay, or deliver property within the time prescribed by this subchapter, or fails to perform other duties imposed by this subchapter, shall pay to the administrator, in addition to interest as provided in

subsection (a), a civil penalty of two hundred dollars (\$200) for each day the report, payment, or delivery is withheld, or the duty is not performed, up to a maximum of five thousand dollars (\$5,000).

(c) A holder who willfully fails to report, pay, or deliver property within the time prescribed by this subchapter, or willfully fails to perform other duties imposed by this subchapter, shall pay to the administrator, in addition to interest as provided in subsection (a), a civil penalty of one thousand dollars (\$1,000) for each day the report, payment, or delivery is withheld, or the duty is not performed, up to a maximum of twenty-five thousand dollars (\$25,000), plus twenty-five percent (25%) of the value of any property that should have been but was not reported.

(d) A holder who makes a fraudulent report shall pay to the administrator, in addition to interest as provided in subsection (a), a civil penalty of one thousand dollars (\$1,000) for each day from the date a report under this subchapter was due, up to a maximum of twenty-five thousand dollars (\$25,000), plus twenty-five percent (25%) of the value of any property that should have been but was not reported.

(e) The administrator for good cause may waive, in whole or in part, interest under subsection (a) and penalties under subsections (b) and (c), and shall waive penalties if the holder acted in good faith and without negligence.

History. Acts 1999, No. 850, § 24;
2005, No. 175, § 4.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of assembly, Property Law, 28 U. Ark. Little Rock L. Rev. 385.

18-28-225. Agreement to locate property.

(a) An agreement by an owner, the primary purpose of which is to locate, deliver, recover, or assist in the recovery of property that is presumed abandoned is void and unenforceable if it was entered into during the period commencing on the date the property was presumed abandoned and extending to a time that is twenty-four (24) months after the date the property is paid or delivered to the administrator. This subsection does not apply to an owner's agreement with an attorney to file a claim as to identified property or contest the administrator's denial of a claim.

(b) An agreement by an owner, the primary purpose of which is to locate, deliver, recover, or assist in the recovery of property is enforceable only if the agreement is in writing, provides for a fee of not more than ten percent (10%) of the recovery, clearly sets forth the nature of the property and the services to be rendered, is signed by the apparent owner, and states the value of the property before and after the fee or other compensation has been deducted.

(c) If an agreement covered by this section applies to mineral proceeds and the agreement contains a provision to pay compensation that includes a portion of the underlying minerals or any mineral proceeds not then presumed abandoned, the provision is void and unenforceable.

(d) An agreement covered by this section which provides for compensation that is unconscionable is unenforceable except by the owner. An owner who has agreed to pay compensation that is unconscionable, or the administrator on behalf of the owner, may maintain an action to reduce the compensation to a conscionable amount. The court may award reasonable attorney's fees to an owner who prevails in the action.

(e) This section does not preclude an owner from asserting that an agreement covered by this section is invalid on grounds other than unconscionable compensation.

History. Acts 1999, No. 850, § 25.

18-28-226. Foreign transactions.

This subchapter does not apply to property held, due, and owing in a foreign country and arising out of a foreign transaction.

History. Acts 1999, No. 850, § 26.

18-28-227. Transitional provisions.

(a) An initial report filed under this subchapter for property that was not required to be reported before July 30, 1999, but which is subject to this subchapter must include all items of property that would have been presumed abandoned during the ten-year period next preceding July 30, 1999, as if this subchapter had been in effect during that period.

(b) This subchapter does not relieve a holder of a duty that arose before July 30, 1999, to report, pay, or deliver property. Except as otherwise provided in § 18-28-219(b), a holder who did not comply with the law in effect before July 30, 1999, is subject to the applicable provisions for enforcement and penalties which then existed, which are continued in effect for the purpose of this section.

History. Acts 1999, No. 850, § 27.

18-28-228. Rules.

The administrator may adopt pursuant to the Arkansas Administrative Procedure Act, § 25-15-201 et. seq., rules necessary to carry out this subchapter.

History. Acts 1999, No. 850, § 28.

18-28-229. Uniformity of application and construction.

This subchapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this subchapter among states enacting it.

History. Acts 1999, No. 850, § 29.

18-28-230. Periods of limitation not a bar.

Any statute of limitations that would vest the ownership of property subject to this subchapter in a holder of said property before expiration of a period of presumed abandonment is tolled until a demand is made by a party entitled to possession.

History. Acts 1979, No. 256, § 15; 1985, No. 780, § 7; A.S.A. 1947, § 50-634; Acts 1997, No. 104, § 1. was not repealed by Acts 1999, No. 850, § 33. In light of the enactment of the new subchapter, former § 18-28-216 was re-

A.C.R.C. Notes. Former § 18-28-216 codified as this section.

18-28-231. Escheatment — United States savings bond.

(a) Notwithstanding any law to the contrary, including § 18-28-202(a)(10) and (14) and § 18-28-219(b), a United States savings bond held or owing in this state is presumed abandoned if the savings bond remains unclaimed for five (5) years after the date of maturity of the United States savings bond.

(b) If a United States savings bond is presumed abandoned under subsection (a) of this section, the United States savings bond shall escheat to the state two (2) years after becoming abandoned property according to subsections (c)-(f) of this section.

(c)(1) If no claim for the United States savings bond is filed under § 18-28-215, the administrator shall file a civil action for escheatment of the United States savings bond within one hundred eighty (180) days after the two-year period under subsection (b) of this section.

(2) The administrator may postpone filing a civil action under subdivision (c)(1) of this section until additional United States savings bonds accumulate to justify the expense of the proceeding.

(d) The administrator shall provide notice of the civil action to an individual named as a defendant in the civil action in the manner provided for under § 16-3-101 et seq., and prescribed by Rule 4 of the Arkansas Rules of Civil Procedure.

(e) If no person files a claim or appears at the hearing to substantiate a claim or if the court determines that a claimant is not entitled to the property claimed by the claimant, then the court shall enter judgment that:

(1) The United States savings bond escheats to the state; and

(2) All property rights and legal title to and ownership of the United States savings bond or proceeds from the United States savings bond, including all rights, powers, and privileges of survivorship of any owner, co-owner, or beneficiary, are vested solely in the state.

(f) Notwithstanding §§ 18-28-213 and 18-28-225, the administrator shall redeem any United States savings bonds escheated to the state and deposit the proceeds recovered by the administrator into the Unclaimed Property Proceeds Trust Fund.

(g)(1) Notwithstanding § 18-28-215(c), a person may file a claim with the administrator for a United States savings bond or the proceeds from the savings bond that has escheated to the state under this section.

(2)(A) Upon submission of sufficient proof of the validity of a claim for a United States savings bond that has escheated to the state, the administrator may pay the claim after deducting the expense incurred by the administrator in securing full title and ownership of the United States savings bond by escheatment.

(B) Upon payment of a valid claim, no action thereafter shall be maintained by any other claimant against the state for the funds.

(h) The administrator may contract with and obtain outside legal counsel in the administration of this section.

History. Acts 2015, No. 563, § 1.

SUBCHAPTER 3 — ACTIONS INVOLVING OTHER STATES

SECTION.

18-28-301 — 18-28-303. [Repealed.]

18-28-301 — 18-28-303. [Repealed.]

Publisher's Notes. This subchapter was repealed by Acts 1999, No. 850, § 33. The subchapter was derived from the following sources:

18-28-301. Acts 1981, No. 850, § 1; 1985, No. 780, § 18; A.S.A. 1947, § 50-648.

18-28-302. Acts 1981, No. 850, § 2; 1985, No. 780, § 19; A.S.A. 1947, § 50-649; Acts 1989 (1st Ex. Sess.), No. 173, § 4.

18-28-303. Acts 1981, No. 850, § 3; 1985, No. 780, § 20; A.S.A. 1947, § 50-650.

SUBCHAPTER 4 — MINERAL PROCEEDS

SECTION.

18-28-401. Definitions.

18-28-402. Escrow accounts.

18-28-403. Abandoned mineral proceeds
— Disposition of funds.

SECTION.

18-28-404. Reports.

Cross References. Natural resources and economic development, § 15-1-101 et seq.

Effective Dates. Acts 1987 (1st Ex. Sess.), No. 35, § 3; June 12, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that the counties of this state are in ur-

gent need of funds to be used to finance the establishment and operation of solid waste disposal facilities, that this Act is designed to provide funds to assist the counties to provide this service and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preserva-

tion of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1989 (3rd Ex. Sess.), No. 39, § 7: Nov. 8, 1989. Emergency clause provided: "It is hereby found and determined by the Seventy-Seventh General Assembly, meeting in Third Extraordinary Session, that the appropriation of funds for the

Unclaimed Mineral Proceeds Program of the Auditor of State, is essential to proper administration of this program. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval."

18-28-401. Definitions.

As used in this subchapter:

(1) "Holder" means a person, wherever organized or domiciled, who is:

(A) In possession of property that belongs to another;

(B) A trustee; or

(C) Indebted to another on an obligation;

(2) "Mineral" means oil, gas, uranium, sulphur, lignite, coal, and any other substance that is ordinarily and naturally considered a mineral in this state, regardless of the depth at which the substance is found; and

(3) "Mineral proceeds" means all obligations:

(A) To pay resulting from the production and sale of minerals from this state; and

(B) For the acquisition and retention of a mineral lease to produce minerals located in this state.

History. Acts 1987, No. 362, § 1.

18-28-402. Escrow accounts.

(a)(1) A holder of mineral proceeds shall establish an escrow account for mineral proceeds if the person entitled to the receipt of the mineral proceeds is unknown or has not been located within one (1) year after the funds became payable or distributable.

(2) The escrow account shall be for the benefit of the rightful recipient of the mineral proceeds.

(3) A person showing to the holder of mineral proceeds sufficient proof of identity and marketable title to the property shall be promptly paid the sum accumulated for his or her benefit in the escrow account.

(b)(1) If a holder of mineral proceeds is required to establish more than one (1) escrow account by operation of this section, then the mineral proceeds accruing may be commingled in a single escrow account.

(2) Separate records of each deposit and withdrawal on behalf of specific persons shall be maintained.

(c) A holder of mineral proceeds who violates this section is subject to a civil penalty not to exceed two thousand five hundred dollars (\$2,500).

(d) The Auditor of State shall enforce this subchapter and may conduct random audits of the escrow accounts required by this section.

History. Acts 1987, No. 362, § 3; 2003, No. 1763, § 1; 2005, No. 1994, § 95; 2009, No. 1175, § 18; 2015, No. 1039, § 2.

Amendments. The 2015 amendment substituted “marketable title to” for “ownership of” in (a)(3); deleted (c) and redesignated the remaining subsections accord-

ingly; deleted “for each violation” following “(\$2,500)” in present (c); and, in present (d), substituted “Auditor of State” for “commission”, deleted “the provisions of” following “enforce”, and substituted “may” for “shall”.

18-28-403. Abandoned mineral proceeds — Disposition of funds.

(a)(1)(A) All mineral proceeds that are held or owing by the holder and that have remained unclaimed by the owner for longer than three (3) years after the mineral proceeds became payable or distributable are presumed abandoned.

(B) Abandoned mineral proceeds are subject to the unclaimed property provisions of the Unclaimed Property Act, § 18-28-201 et seq., except that funds received by the Auditor of State under this section shall be deposited by the Auditor of State into a special trust fund to be known as the “Abandoned Mineral Proceeds Trust Fund”.

(C) Such funds shall be deposited into accounts in one (1) or more financial institutions authorized to do business in this state, to be administered in accordance with the laws of this state pertaining to the appropriation, administration, and expenditure of cash funds.

(2)(A) However, upon petition of the county attorney of the county in which the abandoned minerals were produced or severed, abandoned mineral proceeds that are held pursuant to leases executed by receivers or their successors appointed by a court of proper jurisdiction, shall be remitted by the holder to the county in which the minerals were produced or severed and deposited into the county general fund.

(B) The county attorney shall publish notice of his or her petition in a legal newspaper having general circulation in the county, and the notice shall be published at least one (1) time.

(3) The holder of abandoned mineral proceeds turned over to the Auditor of State under this section shall provide the following information to the Auditor of State:

(A) The name and last known address of the property owner;

(B) The applicable well name, uncontrolled lease name, or unitized area name as recognized by the Oil and Gas Commission;

(C) Either:

(i) The county, section, township, and range of the well; or

(ii) The county, section, township, and range from which the abandoned minerals were severed or produced; and

(D) Any other information required by the Auditor of State.

(b) The Abandoned Mineral Proceeds Trust Fund shall be used by the Auditor of State to pay the claims of persons establishing ownership of mineral proceeds in possession of the state under this subchapter and for the enforcement and administration of this subchapter. At least one (1) time each fiscal year, the Auditor of State shall transfer to the County Aid Fund in the State Treasury all funds in the Abandoned Mineral Proceeds Trust Fund in excess of an amount determined by the Auditor of State to be sufficient to pay the anticipated expenses and claims of the Abandoned Mineral Proceeds Trust Fund.

(c)(1) Funds credited to the County Aid Fund pursuant to the provisions of this subchapter shall annually be equally distributed among all the counties in the state by the Treasurer of State.

(2) All funds remitted to the respective counties shall be credited to the county general fund.

History. Acts 1987, No. 362, § 2; 1987 (1st Ex. Sess.), No. 35, § 1; 1989, No. 904, § 1; 1989 (3rd Ex. Sess.), No. 39, § 2; 1993, No. 1153, § 12; 1995, No. 748, § 1; 2003, No. 1307, § 1; 2013, No. 1130, § 10; 2015, No. 1039, § 3.

Amendments. The 2013 amendment, in (a)(1)(B), substituted “are” for “shall be” and deleted “the Uniform Disposition of

Unclaimed Property Act” following “property provisions of”.

The 2015 amendment substituted “three (3) years” for “five (5) years” in (a)(1)(A); substituted “under” for “pursuant to” in (a)(1)(B); substituted “one (1) time” for “two (2) times a week for two (2) consecutive weeks” in (a)(2)(B); and added (a)(3).

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2003 Arkansas General Assembly, Property Law, Mineral Proceeds, 26 U. Ark. Little Rock L. Rev. 459.

18-28-404. Reports.

A report required to be made to the Auditor of State by a holder of abandoned mineral proceeds under this subchapter shall be submitted to the Auditor of State in an electronic format approved by the Auditor of State.

History. Acts 2015, No. 1039, § 4.

CHAPTER 29
PROPERTY SALES

- SUBCHAPTER.
- 1. GENERAL PROVISIONS. [RESERVED.]
 - 2. UNUSED PROPERTY.

SUBCHAPTER 1 — GENERAL PROVISIONS

[Reserved]

SUBCHAPTER 2 — UNUSED PROPERTY

SECTION.

18-29-201. Definitions.

18-29-202. Prohibited unused property
sale items.

SECTION.

18-29-203. Receipts.

18-29-204. Penalty.

Publisher's Notes. Acts 1999, No. 1350, § 5, provided: "This act shall apply to all new and unused property purchased or acquired on or after January 1, 2000."

18-29-201. Definitions.

As used in this subchapter:

(1) "Baby food" or "infant formula" means any food manufactured, packaged, and labeled specifically for sale for consumption by a child under the age of two (2) years;

(2) "Medical device" means any instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, tool, or other similar or related article, including any component part or accessory, required under federal law to bear the label "Caution: Federal law requires dispensing by or on the order of a physician" or which is defined by federal law as a medical device and which is intended for use in the diagnosis of disease or other conditions or in the cure, mitigation, treatment, or prevention of disease in man or other animals or is intended to affect the structure or any function of the body of a human or other animals, which does not achieve any of its principal intended purposes through chemical action within or on the body of a human or other animals and which is not dependent upon being metabolized for achievement of any of its principal intended purposes;

(3) "New and unused property" means tangible personal property that was acquired by the unused property merchant directly from the producer, manufacturer, wholesaler, or retailer in the ordinary course of business which has never been used since its production or manufacturing or which is in its original and unopened package or container, if the personal property was so packaged when originally produced or manufactured;

(4)(A) "Nonprescription drug" and "over-the-counter drug" mean any nonnarcotic medicine or drug that may be sold without a prescription and is prepackaged for use by the consumer, prepared by the manufacturer or producer for use by the consumer, properly labeled and unadulterated in accordance with the requirements of the state food and drug laws and the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 et seq.

(B) The term “nonprescription drug” shall not include herbal products, dietary supplements, botanical extracts, or vitamins;

(5)(A) “Unused property market” means any event at which:

(i) Two (2) or more persons offer personal property for sale or exchange;

(ii) A fee is charged for sale or exchange of personal property;

(iii) A fee is charged to prospective buyers for admission to the area at which personal property is offered or displayed for sale or exchange; or

(iv) Personal property is offered or displayed for sale or exchange if the event is held more than six (6) times in any twelve-month period, regardless of the number of persons offering or displaying personal property or the absence of fees.

(B)(i) The term “unused property market” is interchangeable with and applicable to “swap meet”, “indoor swap meet”, “flea market”, and other similar terms regardless of whether these events are held inside a building or outside in the open.

(ii) The primary characteristic is that these activities involve a series of sales sufficient in number, scope, and character to constitute a regular course of business.

(C) The term “unused property market” does not mean and shall not apply to:

(i) An event which is organized for the exclusive benefit of any community chest, fund, foundation, association, or corporation organized and operated for religious, educational, or charitable purposes, provided that no part of any admission fee or parking fee charged vendors or prospective purchasers or the gross receipts or net earnings from the sale or exchange of personal property, whether in the form of a percentage of the receipts or earnings, as salary, or otherwise, inures to the benefit of any private shareholder or person participating in the organization or conduct of the event; or

(ii) Any event at which all of the personal property offered for sale or displayed is new and all persons selling, exchanging, or offering or displaying personal property for sale or exchange are manufacturers or authorized representatives of manufacturers or distributors; and

(6) “Unused property merchant” means any person, other than a vendor or merchant with an established retail store in the county, who transports an inventory of goods to a building, vacant lot, or other unused property market location and who, at that location, displays the goods for sale and sells the goods at retail or offers the goods for sale at retail.

History. Acts 1999, No. 1350, § 1.

18-29-202. Prohibited unused property sale items.

(a) No unused property merchant shall offer for sale at an unused property market or knowingly permit the sale of:

(1) Baby food;

- (2) Infant formula;
- (3) Cosmetics or personal care products; or
- (4) Any nonprescription drug or medical device.

(b) This section shall not apply to a person who keeps available for public inspection a written authorization identifying that person as an authorized representative of the manufacturer or distributor of the product, as long as the authorization is not false, fraudulent, or fraudulently obtained.

History. Acts 1999, No. 1350, § 2.

18-29-203. Receipts.

(a)(1) Every unused property merchant shall maintain receipts for the purchase of new and unused property, as defined in § 18-29-201(3).

(2) Receipts shall contain all of the following information:

- (A) The date of the transaction;
- (B) The name and address of the person, corporation, or entity from which the new and unused property was acquired;
- (C) An identification and description of the new and unused property acquired;
- (D) The price paid for such new and unused property; and
- (E) The signature of the seller and buyer of the new and unused property.

(b) It is a violation of this subchapter for an unused property merchant required to maintain receipts under the provisions contained in subsection (a) of this section to knowingly:

- (1) Falsify, obliterate, or destroy such receipts;
- (2)(A) Refuse or fail upon request to make such receipts available for inspection within a period of time which is reasonable under the individual circumstances surrounding the request.

(B) However, nothing contained within the provisions of this section shall be construed to require the unused property merchant to possess the receipt on or about his or her person without reasonable notice; or

(3) Fail to maintain the receipts required by this section for at least two (2) years.

(c) The provisions of this subchapter shall not apply to:

- (1) The sale of a motor vehicle or trailer that is required to be registered or is subject to the certificate of title laws of this state;
- (2) The sale of wood for fuel, ice, or livestock;
- (3) Business conducted in any industry or association trade show;
- (4) Property, although never used, whose style, packaging, or material clearly indicates that the property was not produced or manufactured within recent times;
- (5) Anyone who sells by sample, catalog, or brochure for future delivery;
- (6) The sale of arts or crafts by a person who produces such arts or crafts;

- (7) Persons who make sales presentations pursuant to a prior individualized invitation issued to the consumer by the owner or legal occupant of the premises;
- (8) Garage or yard sales held on premises devoted to residential use; or
- (9) Sales conducted by motor freight carrier companies for the purpose of selling salvage goods.

History. Acts 1999, No. 1350, § 3.

18-29-204. Penalty.

The penalty for violation of this subchapter shall be as follows:

- (1) The first violation shall be a Class B misdemeanor;
- (2) The second violation shall be a Class A misdemeanor; and
- (3) The third or subsequent violation shall be a Class D felony.

History. Acts 1999, No. 1350, § 4.

Cross References. Fines, § 5-4-201.

Imprisonment, § 5-4-401.

CHAPTERS 30-38

[Reserved]

CHAPTER 39

GENERAL PROVISIONS

[Reserved]

SUBTITLE 4. MORTGAGES AND LIENS

CHAPTER 40

MORTGAGES

SECTION.

- 18-40-101. Proof or acknowledgment — Recording.
- 18-40-102. Lien attaches when recorded.
- 18-40-103. Extension of maturity date.
- 18-40-104. Acknowledgment of satisfaction on record.
- 18-40-105. Certification upon payment before sale.
- 18-40-106. Sufficiency of satisfaction — Transfer or assignment.

SECTION.

- 18-40-107. Attestation of satisfaction — Separate release.
- 18-40-108. Validation of prior releases.
- 18-40-109. Transfer, etc., by separate instrument.
- 18-40-110. Recording by public utilities covering property situated in more than one county.

Cross References. Loans secured by liens on agricultural lands, § 23-32-203.

Recording in recorder's office, § 14-15-401 et seq.

Effective Dates. Acts 1877, No. 22, § 2: effective on passage.

Acts 1891, No. 7, § 2: effective on passage.

Acts 1917, No. 374, § 5: Mar. 24, 1917. Emergency declared.

Acts 1955, No. 101, § 5: Feb. 23, 1955. Emergency clause provided: "The General Assembly finds it to be a fact, and so declares, that many instruments contain defective acknowledgments due to errors in the preparation thereof, without fault upon the part of the person, firm or corporation so executing said instruments; that these defective acknowledgments hamper the sale of real estate throughout the State and retard the development of industries and other businesses in the State of Arkansas; that this Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared to exist and this Act shall be in full force and effect from and after its passage and approval."

Acts 1961, No. 185, § 10-101: effective midnight on Dec. 31, 1961.

Acts 1973, No. 604, § 4: Apr. 5, 1973. Emergency clause provided: "It is hereby found and determined by the General Assembly that the provisions of Section 1 of Act No. 260 of 1911 relating to the methods of giving notice that payment has been made upon an existing indebtedness are at this time inadequate and should be enlarged, as the present provisions for the giving of such notice are unduly restric-

tive, are a deterrent to the obtaining of financing for agricultural, commercial and industrial purposes in the State of Arkansas, and that it is immediately necessary to correct this undesirable situation. Therefore, an emergency is hereby declared to exist, and this Act shall be in effect from the date of its passage and approval."

Acts 2015, No. 918, § 2: Apr. 1, 2015. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that historically low interest rates make conditions favorable for the citizens of this state to obtain financing to purchase or refinance a home; that the ability to close the purchase or refinance of a home at a favorable interest rate can save citizens thousands of dollars on one of their largest and most important investments; that delays due to the failure to timely release a mortgage after the mortgage has been paid can result in immediate and substantial harm; that due to mortgage industry practices it can be extremely difficult to locate the proper lender to obtain a mortgage release and therefore an immediate need exists to provide an alternative method to obtain the release. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

RESEARCH REFERENCES

ALR. Debts included in provision of mortgage purporting to cover all future and existing debts (dragnet clause). 3 A.L.R.4th 690.

Damages recoverable for real estate mortgagee's refusal to discharge mortgage or give partial release therefrom. 8 A.L.R.4th 853.

What transfers justify acceleration under "due-on-sale" clause of real estate mortgage. 22 A.L.R.4th 1266.

Mortgagee-lender's duty, in disbursing funds, to protect mortgagor against out-

standing or potential mechanics' liens against the mortgaged property. 30 A.L.R.4th 134.

"Wraparound" mortgages. 36 A.L.R.4th 144.

Statutes expressly protecting borrowers in second mortgage transactions. 43 A.L.R.4th 675.

Am. Jur. 54A Am. Jur. 2d, Mort., § 1 et seq.

Ark. L. Notes. Copeland, Recent Arkansas Cases Involving Article Nine of the U.C.C., 1995 Ark. L. Notes 31.

Ark. L. Rev. Secured Transactions: Article IX: Part 1, 16 Ark. L. Rev. 108.

The Old and the New: Article IX, 16 Ark. L. Rev. 145.

The Trustee in Bankruptcy and the Secured Creditor, 17 Ark. L. Rev. 46.

Nickles, A Localized Treatise on Secured Transactions — Part 1: Scope of Article 9, 34 Ark. L. Rev. 377.

C.J.S. 59 C.J.S., Mort., § 1 et seq.

18-40-101. Proof or acknowledgment — Recording.

All mortgages of real estate shall be proven or acknowledged in the same manner that deeds for the conveyance of real estate are required by law to be proven or acknowledged. When so proven or acknowledged they shall be recorded in the counties in which the lands lie.

History. Rev. Stat., ch. 101, § 1; Acts 1877, No. 22, § 1, p. 17; 1891, No. 7, § 1, p. 6; C. & M. Dig., § 7380; Pope's Dig., § 9434; Acts 1961, No. 185, § 10-102(2); A.S.A. 1947, § 51-1001.

Publisher's Notes. Acts 1846, § 3, p.

77, and Acts 1846, § 3, p. 108, provided that nothing contained in the acts would be construed to change, or in any manner affect, §§ 14-15-411, 18-40-101, and 18-40-102.

RESEARCH REFERENCES

Ark. L. Notes. Atkinson, Laurence, The Avoidance by an Arkansas Bank-

ruptcy Trustee of a Mortgage Defectively Acknowledged, 2003 Arkansas L. Notes 1.

CASE NOTES

ANALYSIS

Deed of Trust.
Defective Acknowledgments.
Nonresidents.
Place of Filing.

Deed of Trust.

A deed of trust executed for the purpose of securing a debt, to be void upon payment of the debt, is a mortgage. *Cross v. Fombey*, 54 Ark. 179, 15 S.W. 461 (1891); *Smead v. D.W. Chandler & Co.*, 71 Ark. 505, 76 S.W. 1066 (1903).

Defective Acknowledgments.

A defective acknowledgment of a mortgage cannot be taken advantage of by one acquiring the mortgaged property without value. *Moore v. City of Little Rock*, 42 Ark. 66 (1883); *Leonhard v. Flood*, 68 Ark. 162, 56 S.W. 781 (1900).

Nonresidents.

This section requires that a mortgage executed by a nonresident, which includes

an account due from a resident, should be recorded in the county where the debtor resides in order to constitute a lien thereon. *Smead v. D.W. Chandler & Co.*, 71 Ark. 505, 76 S.W. 1066 (1903).

Place of Filing.

In counties where there are two judicial districts, the districts are to be treated within the recording acts as two counties, and a delivery of a mortgage to a deputy in charge of one district is prima facie delivery for filing in his district. *Beaver v. Frick Co.*, 53 Ark. 18, 13 S.W. 134 (1890).

Cited: *Main v. Alexander*, 9 Ark. 112 (1848); *Jacoway v. Gault*, 20 Ark. 190 (1859); *Ringo v. Wing*, 49 Ark. 457, 5 S.W. 787 (1887); *Leonhard v. Flood*, 68 Ark. 162, 56 S.W. 781 (1900); *O'Neill v. Lyric Amusement Co.*, 119 Ark. 454, 178 S.W. 406 (1915); *In re Bearhouse, Inc.*, 99 B.R. 926 (Bankr. W.D. Ark. 1989).

18-40-102. Lien attaches when recorded.

Every mortgage of real estate shall be a lien on the mortgaged property from the time it is filed in the recorder's office for record, and not before. The filing shall be notice to all persons of the existence of the mortgage.

History. Rev. Stat., ch. 101, § 2; C. & M. Dig., § 7381; Pope's Dig., § 9435; Acts 1961, No. 185, § 10-102(3); A.S.A. 1947, § 51-1002.

Publisher's Notes. Acts 1846, § 3, p.

77, and Acts 1846, § 3, p. 108, provided that nothing contained in the acts would be construed to change, or in any manner affect, §§ 14-15-411, 18-40-101, and 18-40-102.

RESEARCH REFERENCES

Ark. L. Rev. Priority of Liens on Real Property in Arkansas: Mortgages and Mechanics' and Materialmen's Liens, 12 Ark. L. Rev. 170.

Note, Mennonite Board of Missions v. Adams: 11 Years After Fuentes v. Shevin,

the Supreme Court Has Found That Creditors Also Have Notice Rights, 37 Ark. L. Rev. 971.

CASE NOTES**ANALYSIS**

Applicability.
Bankruptcy.
Criminal Offenders.
Defective Acknowledgment.
Filing.
Mistake in Record.
Noncompliance.
Notice.
Priority.
—Relation Back.
Purchase Money Mortgage.
Subsequent Purchasers.

Applicability.

An equitable mortgage is not controlled by the statute requiring mortgages to be recorded in order to constitute a lien. Carroll v. Evans, 190 Ark. 511, 79 S.W.2d 425 (1935).

Bankruptcy.

A discharge in bankruptcy does not defeat a mortgage lien, which attaches when it is recorded. Haney v. Phillips, 72 Ark. App. 202, 35 S.W.3d 373 (2000).

Criminal Offenders.

When § 16-92-101, making the property of an accused person liable for the fine and costs, was read with this section, the conclusion was unavoidable that the legislature intended to give the state a

lien as against an unrecorded mortgage. Western Tie & Timber Co. v. Campbell, 113 Ark. 570, 169 S.W. 253 (1914).

Defective Acknowledgment.

Recorded mortgage defectively acknowledged was no lien as against mechanic's lien. O'Neill v. Lyric Amusement Co., 119 Ark. 454, 178 S.W. 406 (1915).

A lien with a defective acknowledgment but regular on its face and properly recorded is constructive notice to third parties and is not voidable by a bankruptcy trustee under 11 U.S.C. § 544(a). In re Bearhouse, Inc., 99 B.R. 926 (Bankr. W.D. Ark. 1989).

Jurat attached to a mortgage was not an acknowledgment and, therefore, the mortgage lien was unperfected under Arkansas law; the provisions of § 18-12-208 could not be used to cure the defect in the mortgage because that statute did not act to supply an acknowledgment when in fact there was none. In re Beene, 354 B.R. 856 (Bankr. W.D. Ark. 2006) (decision under prior law).

Filing.

Leaving a mortgage and paying the fees for recording it in the recorder's office with a person in charge of the office for the time being, though not a legal deputy, is a sufficient filing to protect and secure the

rights of the mortgagee. *Oats v. Walls*, 28 Ark. 244 (1873), overruled in part, *Turman v. Bell*, 54 Ark. 273, 15 S.W. 886 (1891).

A mortgage is not a lien as against third parties until filed for record. *Thornton v. Findley*, 97 Ark. 432, 134 S.W. 627 (1911).

Recording of mortgages in the office of the circuit clerk constituted the final step to perfect transfer of lien from claims of bona fide purchasers. *W.E. Tucker Oil Co. v. First State Bank of Crossett*, 55 B.R. 78 (Bankr. W.D. Ark. 1985), *aff'd*, 64 B.R. 183 (W.D. Ark. 1986).

Mistake in Record.

Mistake in the record as to mortgagor's middle initial was immaterial. *Fincher v. Hanegan*, 59 Ark. 151, 26 S.W. 821 (1894).

Under this section, a creditor bank's recorded mortgage did not put a bona fide purchaser on constructive notice because it was not possible to tell exactly what land was being described; thus, Chapter 12 debtors in possession could avoid the lien under 11 U.S.C.S. § 544(a)(3). *Caine v. First State Bank of Crossett* (In re Caine), 462 B.R. 688 (Bankr. W.D. Ark. 2011), *aff'd*, No. 1:12-CV-1012, 2014 U.S. Dist. LEXIS 43360 (W.D. Ark. Mar. 31, 2014).

Noncompliance.

An unacknowledged and unrecorded mortgage is good between the parties, but it constitutes no lien upon the mortgaged property as against strangers, unless it is acknowledged and recorded, even though they may have actual notice of its existence. *Main v. Alexander*, 9 Ark. 112 (1848); *Jacoway v. Gault*, 20 Ark. 190 (1859); *Ringo v. Wing*, 49 Ark. 457, 5 S.W. 787 (1887); *Leonhard v. Flood*, 68 Ark. 162, 56 S.W. 781 (1900).

Notice.

Registry of a mortgage without acknowledgment does not constitute constructive notice to the world. *Main v. Alexander*, 9 Ark. 112 (1848); *Hannah v. Carrington*, 18 Ark. 85 (1856).

Actual notice of an unregistered mortgage is insufficient. *Carnall v. Duval*, 22 Ark. 136 (1860).

The recording of a subsequent mortgage is no notice to a prior mortgagee. *Birnie v. Main*, 29 Ark. 591 (1874).

An unrecorded mortgage, or one which is not entitled to record due to defective

acknowledgment is not binding upon a third person, even though the third person may have actual notice of its existence. *Fry v. Martin*, 33 Ark. 203 (1878); *Dodd v. Parker*, 40 Ark. 536 (1883); *Merchants & Farmers Bank v. Citizens Bank*, 125 Ark. 131, 187 S.W. 650 (1916); *Haney v. Johnson*, 132 Ark. 166, 200 S.W. 788 (1918); *Simpson v. First Nat'l Bank*, 173 Ark. 284, 292 S.W. 138 (1927); *Polster v. Langley*, 201 Ark. 396, 144 S.W.2d 1063 (1940).

A mortgage negligently withdrawn from recorder's office before it is spread of record gives no notice. *Turman v. Bell*, 54 Ark. 273, 15 S.W. 886 (1891).

A subsequent bona fide purchaser of mortgaged lands was not put on notice of the mortgage where the range number was not included in the record. *Neas v. Whitener-London Realty Co.*, 119 Ark. 301, 178 S.W. 390 (1915).

Facts in bankruptcy trustee's preferential transfer action against two creditor banks demonstrated clearly that the bank's mortgages were granted by and recorded against entities which were not record owners of the property mortgaged; thus, absent any other argument, since the banks' mortgages were not properly recorded against the entities which possessed legal interests in the properties, those mortgages did not affect title to the properties and would not operate as constructive notice under § 14-15-404(a) or this section. *Rice v. First Ark. Valley Bank* (In re May), 310 B.R. 405 (Bankr. E.D. Ark. 2004).

Priority.

Between conflicting mortgages, the one first filed will have precedence. *Mitchell v. Badgett*, 33 Ark. 387 (1878).

Mortgage filed for record first is prior though caption is of "Second Mortgage." *Reidmiller v. Comes*, 158 Ark. 21, 249 S.W. 354 (1923).

Where a mortgage correctly describing a tract of land was not properly acknowledged, a second mortgage properly acknowledged, but incorrectly describing the tract, was not entitled to priority, where no attempt was made to reform the second mortgage so as to describe the tract correctly prior to the rights of the parties becoming fixed. *Drew County Bank & Trust Co. v. Sorben*, 181 Ark. 943, 28 S.W.2d 730 (1930).

Where mortgage was not filed for record until the title of the purchaser at tax sale became valid as against the original owner, mortgagees permitted purchaser's title to become valid as against the lien of their mortgage. *Sims v. Petree*, 206 Ark. 1023, 178 S.W.2d 1016 (1944).

The party who first records a mortgage has priority. *Sims v. McFadden*, 217 Ark. 810, 233 S.W.2d 375 (1950).

Judgment creditor by virtue of execution has superior lien over holder of prior unrecorded chattel mortgage. *In re Watson*, 99 F. Supp. 49 (W.D. Ark. 1951).

Second priority lender's argument that the first lender could not meet the requirements of § 4-3-309 because it could not show that it was entitled to enforce the note at the time the note was lost failed because even so, the first mortgage was still enforceable and did not elevate the second priority lender to first priority. *Arvest Bank v. Bank of Am., N.A.*, 2013 Ark. App. 112 (2013).

—Relation Back.

Where, prior to the recording of a construction money mortgage, one materialman furnished materials for construction of home, the mortgagee, by paying first materialman, did not defeat the priority of liens of subsequent materialman who furnished materials after the recording of the mortgage, as their liens related back to commencement of construction of the home and were on an equality with that of the first materialman. *Planters Lumber*

Co. v. Jack Collier E. Co., 234 Ark. 1091, 356 S.W.2d 631 (1962).

Purchase Money Mortgage.

Deed is encumbered by purchase money mortgage at time it is filed. Purchase money mortgage, executed with deed as a part of one continuous transaction, and recorded within a reasonable time to prevent detrimental reliance by a third party, is superior to any other lien. *Garrett Tire Center, Inc. v. Herbaugh*, 294 Ark. 21, 740 S.W.2d 612 (1987).

Subsequent Purchasers.

Court doubts that the principle that an unrecorded deed is not valid against a subsequent purchaser unless he had actual notice of the prior interest applies in mortgage priority disputes, given that every mortgage of real estate shall be a lien on the mortgaged property from the time it is filed in the recorder's office for record, and not before, and case law held that a defective mortgage constituted no notice to third parties of the existence of the mortgage. *Ocwen Loan Servicing LLC v. Summit Bank, N.A. (In re Francis)*, 750 F.3d 754 (8th Cir. 2014).

Cited: *Jarratt v. McDaniel*, 32 Ark. 598 (1877); *Howell v. Walker*, 111 Ark. 362, 164 S.W. 746 (1914); *Chicago, R.I. & Pac. Ry. v. Earl*, 121 Ark. 514, 181 S.W. 925 (1916); *Halbrook v. Lewis*, 204 Ark. 579, 163 S.W.2d 171 (1942); *In re W.E. Tucker Oil, Inc.*, 42 B.R. 897 (Bankr. W.D. Ark. 1984); *Del Mack Constr., Inc. v. Owens*, 82 Ark. App. 415, 118 S.W.3d 581 (2003).

18-40-103. Extension of maturity date.

(a)(1) No agreement for the extension of the date of maturity of the whole, or any part, of any debt or note secured by mortgage, deed of trust, or vendor's lien or for the renewal thereof, whether made in writing or otherwise, and no written or oral acknowledgment of indebtedness thereon, shall operate, so far as it affects the rights of third parties, to revive the debts or extend the operation of the statute of limitations with reference thereto, unless the parties execute and acknowledge a written agreement setting forth the terms of the extension or renewal and the description of the property affected and record it in the office of the recorder of the county in which the property is located, or unless a memorandum showing the extension or renewal is endorsed on the margin of the record where the instrument is recorded, which endorsement shall be attested and dated by the clerk.

(2)(A) In counties which use other than paper recording systems, all marginal endorsements entered after December 31, 1995, are void.

(B) The clerks in counties which use other than paper recording systems shall not allow any marginal endorsements to be made after December 31, 1995, and shall not attest or date any marginal endorsements after December 31, 1995.

(b) In all cases of existing recorded mortgages, deeds of trust, or deeds barred by the terms of this section, or when the debt retains liens, when the debt or liability would be barred by the terms of this section, the party in whose favor the debt or liability exists shall be allowed one (1) year from the date of the debt or liability to bring action to enforce it.

History. Acts 1917, No. 374, § 1; C. & M. Dig., § 7382; Pope's Dig., § 9436; Acts 1973, No. 604, § 2; A.S.A. 1947, § 51-1010; Acts 1995, No. 1025, § 1.

Cross References. Tolling statute of limitations, notation of payments made in margin, § 18-49-101.

CASE NOTES

ANALYSIS

Applicability.
Effect of Noncompliance.
Enforcement Between Mortgagees.
Estoppel.
Lis Pendens.
Third Parties.

Applicability.

This section has no application where there is no agreement to extend or renew the debt secured by the lien, the requirement that payments be endorsed on record in order to stop the running of the statute of limitations being covered by § 18-49-101. *Elk Horn Bank & Trust Co. v. Spraggins*, 182 Ark. 27, 30 S.W.2d 858 (1930); *Rhine v. Mack*, 194 Ark. 606, 108 S.W.2d 1079 (1937).

This section did not apply where no extension agreements or payments were made on a note and it was not necessary to have them, foreclosure suit having been instituted within the statutory period of limitation. *First State Bank v. Cook*, 192 Ark. 213, 90 S.W.2d 510 (1936).

Effect of Noncompliance.

The effect of former similar statute, as to strangers to the transaction, was that when the debt secured by a mortgage was apparently barred by limitation, and no payments which would stay the limitation were endorsed on the margin of the record of the mortgage, it became as to such third parties an unrecorded mortgage and like

an unrecorded mortgage it constituted no lien upon the mortgaged property, as against such third party, notwithstanding he had actual knowledge of the execution of such mortgage. *Morgan v. Kendrick*, 91 Ark. 394, 121 S.W. 278 (1909) (decision under prior law).

Failure to endorse extensions in margin held to confer priority on subsequent lien. *Reed v. Pollard*, 190 Ark. 566, 79 S.W.2d 1001 (1935); *Clark v. Shockley*, 205 Ark. 507, 169 S.W.2d 635 (1943); *Exchange Bank & Trust v. Gibbons*, 228 Ark. 454, 307 S.W.2d 877 (1957).

Effect of failure to make marginal notations on record of mortgage before the bar of limitations attaches according to the record is, as to third parties, to reduce the instrument to the status of an unrecorded mortgage. *Hamburg Bank v. Zimmerman*, 196 Ark. 849, 120 S.W.2d 380 (1938).

This section means that where the debt secured by the recorded mortgage is apparently barred, and there is no endorsement of payment or extension agreement on the margin of the record where the mortgage is recorded, keeping it alive, the mortgage then becomes, in effect, an unrecorded mortgage and the lien thereof is not effective against third parties. *Polster v. Langley*, 201 Ark. 396, 144 S.W.2d 1063 (1940).

Failure to endorse extensions held to free title from lien of mortgage. *Polster v. Langley*, 201 Ark. 396, 144 S.W.2d 1063 (1940).

Enforcement Between Mortgagees.

A parol agreement between the first and second mortgagees that their mortgages should be extended, made with the understanding that the first mortgage had priority, was considered by the court to have been valid, and thereafter the second mortgagee was estopped to assert that the second mortgagee had secured priority on the ground that the first mortgage had on the record become barred by limitation. *Merchants' & Planters' Bank v. Citizen's Bank*, 175 Ark. 417, 299 S.W. 753 (1927).

Where a debt secured by mortgage was apparently barred by limitation and there was no endorsement on the margin of the record, it became as to a second mortgagee an unrecorded mortgage and constituted no lien upon the mortgaged property as against the second mortgagee even though the second mortgagee had actual knowledge of the execution of the mortgage, and agreed upon taking the second mortgage that the prior mortgage should be first paid, where such agreement was not incorporated in the second mortgage and the first mortgage was barred when the agreement was made. *Wells v. Farmers' Bank & Trust Co.*, 181 Ark. 950, 28 S.W.2d 1059 (1930).

Estoppel.

One who takes a mortgage reciting that it is a second mortgage is not entitled to assert that the prior mortgage is barred by reason of failure to endorse a memorandum on the record of the renewal note secured by the prior mortgage as the second mortgagee contracted with reference to the first mortgage. *Gunnels v. Farmers' Bank*, 184 Ark. 149, 40 S.W.2d 989 (1931).

Bank taking mortgage containing warrant of title to mortgaged property against all claims except prior mortgage, specifically mentioned, on part of the property was estopped to plead the statute of limitations against prior mortgage when it became barred for failure to endorse credits on the margin thereof. *Bank of Atkins v. Griffin*, 205 Ark. 203, 168 S.W.2d 382 (1943).

Lis Pendens.

Where order of dismissal was final determination of mortgage foreclosure suit filed with notice of lis pendens and it reinstated the mortgage in full force and effect as though no suit had been filed, the

order, under the lis pendens rule, was binding on judgment creditors of mortgagor who secured judgment after beginning of suit and precluded them from contending that subsequent foreclosure suit was barred by limitations for failure to make marginal endorsements of payment within five years. *Mitchell v. Federal Land Bank*, 206 Ark. 253, 174 S.W.2d 671 (1943), superseded by statute as stated in, *Croft v. Croft*, 8 Ark. App. 20, 648 S.W.2d 511 (1983).

Third Parties.

This section protects only third persons. *Gunnels v. Farmers' Bank*, 184 Ark. 149, 40 S.W.2d 989 (1931).

One owning a royalty interest in land may plead the statute of limitation as against a foreclosure of a prior mortgage where he was not a party to the foreclosure and there was no endorsement on the mortgage record extending the time of maturity of the mortgage. *Arrington v. United Royalty Co.*, 188 Ark. 270, 65 S.W.2d 36 (1933).

Where a bank took two mortgages on the same property and assigned one, the bank was not a "third party" and could not invoke the benefit of the statute requiring the extension of maturity of such assigned mortgage to be endorsed on the mortgage record. *Wasson v. Tapscott*, 188 Ark. 771, 67 S.W.2d 728 (1934).

Execution creditor purchasing at own execution sale was not a third person within this section. *Citizens Bank & Trust Co. v. Garrott*, 192 Ark. 599, 93 S.W.2d 319 (1936).

Judgment creditors of mortgagors to whom deeds of trust were executed to secure their judgments were not strangers or third parties to mortgage within the protection of this section. *Gibson v. Doughty*, 193 Ark. 1037, 104 S.W.2d 449 (1937).

Purchaser from mortgagor, his grantee and purchaser from grantee's administratrix at sale ordered by probate court, were all third parties protected against mortgagee's successor where no notation of payment was made on the record for five years after maturity of note secured by the mortgage, mere knowledge of debt being insufficient to prevent the statutory bar. *Hamburg Bank v. Zimmerman*, 196 Ark. 849, 120 S.W.2d 380 (1938).

Grantee of mortgaged premises who, though he did not assume and agree to

pay the mortgaged indebtedness, bought subject to it and his deed so specifically provided, is not a third party within the meaning of this section so as to be entitled to their protection, and his widow and heirs have no better standing as third parties than he did. *Henry v. Coe*, 200 Ark. 44, 137 S.W.2d 897 (1940).

Where payments tolling the statute of limitations were made by mortgagor but not endorsed on margin of record, after

five years from due date of indebtedness described in the mortgage, junior mortgage became superior even though junior mortgagee knew of prior mortgage, since it was not shown that he was other than a stranger or third person to such mortgage. *Clark v. Shockley*, 205 Ark. 507, 169 S.W.2d 635 (1943).

Cited: *Rockford Trust Co. v. Purtell*, 183 Ark. 918, 39 S.W.2d 733 (1931).

18-40-104. Acknowledgment of satisfaction on record.

(a) If a mortgagee or his or her executor, administrator, or assignee receives full satisfaction for the amount due on any mortgage, then at the request of the person making satisfaction, the mortgagee shall acknowledge satisfaction of the amount due on the mortgage on the margin of the record in which the mortgage is recorded.

(b) Acknowledgment of satisfaction, made as stated in subsection (a) of this section, shall have the effect to release the mortgage, bar all actions brought on the mortgage, and revest in the mortgagor or his or her legal representative all title to the mortgaged property.

(c) The trustee of a deed of trust or a person employed by the trustee shall reconvey all or any part of the property encumbered by a deed of trust to the person entitled to the property on written request of the beneficiary of the deed of trust for a reasonable fee plus costs.

(d) If a person receiving satisfaction does not, within sixty (60) days after being requested, acknowledge satisfaction as stated in subsection (a) of this section or request the trustee to reconvey the property as stated in subsection (c) of this section, he or she shall forfeit to the party aggrieved any sum not exceeding the amount of the mortgage money, to be recovered by a civil action in any court of competent jurisdiction.

(e) If a person receiving satisfaction does not, within sixty (60) days after being requested, acknowledge satisfaction as stated in subsection (a) of this section or fails to cause the trustee to reconvey the property as stated in subsection (c) of this section, then, in addition to the rights provided in subsection (d) of this section, a satisfaction affidavit may be recorded in the county where the lien is recorded which shall have the same effect as an acknowledgment of satisfaction as stated in subsection (b) of this section or a reconveyance of the property as stated in subsection (c) of this section.

(f) A satisfaction affidavit may be executed and recorded by a:

(1) Licensed attorney who prepared the original mortgage or deed of trust;

(2) Licensed attorney who represents the person making or having received satisfaction; or

(3) Licensed title agent employed by a title company that tendered the satisfaction on behalf of the person making satisfaction.

(g) A satisfaction affidavit shall:

(1) Be sworn to and acknowledged before a person authorized to administer an oath under the laws of this state;

(2) Conspicuously identify in its title that it is a "Satisfaction Affidavit"; and

(3) Contain the following information concerning the satisfaction:

(A) The names of all parties to the original instrument;

(B) The recording information, including the recording date of the original instrument;

(C) The date of payment and the amount paid to satisfy the indebtedness; and

(D) That more than sixty (60) days have elapsed since the request for the acknowledgement of satisfaction.

(h) A satisfaction affidavit may be prepared in substantially the following form:

"SATISFACTION AFFIDAVIT

KNOW ALL PERSONS BY THESE PRESENTS that:

I, [Name of Affiant], am the [Attorney for the Mortgagor or Employee of a Title Company that Tendered the Satisfaction on Behalf of the Mortgagor].

[Name of Mortgagor] mortgaged certain real property to [Name of Mortgagee] to secure the original principal indebtedness of [Amount of Indebtedness] which was evidenced by that certain [Name of Instrument] recorded on [Date] in the real property records of [Name of County] County, Arkansas, as [Instrument Number or Book and Page].

On [Date], [Name of Mortgagor] tendered to [Name of Mortgagee] the sum of [Amount of Satisfaction], which sum represents the full satisfaction of the amount due on the [Name of Instrument]. [Name of Mortgagor] requested from [Name of Mortgagee] an acknowledgment of satisfaction on [Date]. More than sixty (60) days have elapsed since the request of the acknowledgement of satisfaction.

Further affiant sayeth naught.

WITNESS my hand and seal on this ____ day of _____, 20____.

[Signature]

Name printed:

ACKNOWLEDGMENT

STATE OF

}

}ss.

COUNTY OF

}

On this _____ day of _____, 20____, before me, a Notary Public in and for the said county and state, personally appeared _____, to me well known, and acknowledged that [he/she] had executed the foregoing document for the consideration, uses, and purposes therein mentioned and set forth.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Notary Public

My Commission Expires:_____".

(i) A satisfaction affidavit that complies with this section in substantially the form provided by subsection (h) of this section or in a custom form shall be:

(1) Recorded by the county recorder in the land records of the county where the real property is located; and

(2) Indexed by the county recorder in the same manner as an acknowledgment of satisfaction.

(j)(1) Subsections (a) and (b) of this section do not apply in a county which uses a system other than a paper recording system.

(2) The clerk in a county which uses a system other than a paper recording system shall not allow a satisfaction by a marginal notation after December 31, 1995.

(3) A satisfaction by a marginal notation made in a county which uses a system other than a paper recording system after December 31, 1995, is void.

History. Rev. Stat., ch. 101, §§ 18-20; C. & M. Dig., §§ 7395-7397; Pope's Dig., §§ 9452-9454; A.S.A. 1947, §§ 51-1011 — 51-1013; Acts 1995, No. 1025, § 2; 2005, No. 1945, § 1; 2015, No. 918, § 1.

A.C.R.C. Notes. As enacted by Acts 1995, No. 1025, § 2, subdivision (d)(1)

began: "Effective January 1, 1996,".

The 2015 amendment added a "period" to the Satisfaction Affidavit of subsection (h) without markup.

Amendments. The 2015 amendment inserted (e)-(i), and redesignated former (e) as (j).

CASE NOTES

ANALYSIS

Construction.

Applicability.

Attorney's Fees.

Burden of Proof.

Duty to Acknowledge.

Noncompliance.

Penalties.

Request for Satisfaction.

Service of Summons.

Construction.

This section, being penal in nature, must be strictly construed and cannot be extended to include equitable mortgages. *Reed v. Frauenthal*, 133 Ark. 544, 202 S.W. 700 (1918).

Applicability.

This section does not apply in a case of a sale with retention of a vendor's lien. *Reed v. Frauenthal*, 133 Ark. 544, 202 S.W. 700 (1918).

Appellate court reversed and remanded trial court's cancellation of mortgage because subsection (c) of this section did not apply to a mortgage that had not yet been satisfied; on remand, the trial court did

not err in denying bank's request for interest, costs, penalties, and attorney's fees because it found that those had accrued solely due to bank's wrongful actions. *Nationsbank Mortg. Corp. v. Hopkins*, 87 Ark. App. 297, 190 S.W.3d 299 (2004).

Attorney's Fees.

Attorney's fees should not have been awarded in an action involving a mortgagee's failure to cancel a mortgage because the action was not primarily based on contract; the action was based on a violation of this section and negligence. *Nationsbank Mortg. Corp. v. Hopkins*, 82 Ark. App. 91, 114 S.W.3d 757 (2003).

Burden of Proof.

In a suit to recover the penalty provided for in this section, the burden is on the plaintiff to prove that the acknowledgment was not made within the required time. *Hill-Ingham Lumber Co. v. Neal*, 89 Ark. 385, 117 S.W. 247 (1909).

Duty to Acknowledge.

It is the duty of assignee under unrecorded assignment to acknowledge satisfaction. *Adams v. McKay & Binns Inv. Co.*, 155 Ark. 556, 244 S.W. 708 (1922).

Noncompliance.

In a suit for failure to satisfy a mortgage, the fact that the attorney for the mortgagee endorsed upon a decree of the chancery court payment in full of the indebtedness secured by the mortgage did not comply with this section. *Barnett v. Bank of Malvern*, 176 Ark. 766, 4 S.W.2d 17 (1928).

Penalties.

Award held not excessive. *Johns v. Rollison*, 152 Ark. 52, 237 S.W. 448 (1922).

Although it was not his duty to record a release, the purchaser of mortgaged property who paid the balance due on the account, upon being tendered an unrecorded release, was under duty to minimize any damage he might sustain due to the refusal of the vendor to record the release by recording it himself and was therefore not entitled to recover damages resulting from failure to record. *Hatch v. Lowrance*, 178 Ark. 274, 10 S.W.2d 358 (1928).

It was not error to instruct the jury that under this section substantial recovery was intended as punishment against the mortgagee for refusing to comply with the request. *Barnett v. Bank of Malvern*, 183 Ark. 1030, 39 S.W.2d 1014 (1931).

Refusal to satisfy lien or mortgage securing notes, where no actual damage or loss was established, did not justify im-

sition of penalty. *Price v. Center*, 200 Ark. 19, 138 S.W.2d 391 (1940).

Because the trial court's finding that two mortgagors suffered actual monetary damages as a result of a mortgagee's failure to cancel a mortgage was not clearly erroneous, a penalty was properly awarded; however, the court did not have the authority to cancel the mortgage where debt was still owed, and the record did not show that the court intended to cancel the mortgage in lieu of awarding damages. *Nationsbank Mortg. Corp. v. Hopkins*, 82 Ark. App. 91, 114 S.W.3d 757 (2003).

Request for Satisfaction.

It is not necessary that both joint mortgagors request the entry of "satisfaction" but the one paying the debt is sufficient. *Johns v. Rollison*, 152 Ark. 52, 237 S.W. 448 (1922).

Service of Summons.

Service of summons upon a domestic corporation was ineffective where mortgagee corporation's employee, who picked up and signed for the certified mail, was not listed in any file at either the post office or the Secretary of State's office as an agent for service of registered mail, nor had express authority to receive restricted mail. *Henry v. Gaines-Derden Enters., Inc.*, 314 Ark. 542, 863 S.W.2d 828 (1993).

18-40-105. Certification upon payment before sale.

If mortgaged property is redeemed by payment to the officer before the sale, the officer shall make a certificate thereof and acknowledge it before some officer authorized to take acknowledgment of deeds for lands. The certificate shall be recorded in the office in which the mortgage is recorded and shall have the same effect as satisfaction entered on the margin of the record.

History. Rev. Stat., ch. 101, § 21; C. & M. Dig., § 7398; Pope's Dig., § 9455; A.S.A. 1947, § 51-1015.

18-40-106. Sufficiency of satisfaction — Transfer or assignment.

(a)(1) Satisfaction of any mortgage, deed of trust, vendor's lien, or lien retained in deed or note made and endorsed on the margin of the record where the instrument is recorded by the mortgagee, trustee, beneficiary, agent of the owner of record of the indebtedness, or by the owner of record thereof, shall be full and complete protection for any subsequent purchaser, mortgagee, or judgment creditor of the mort-

gagor or grantor, unless there shall appear on the margin of the record where the instrument is recorded a memorandum showing that the mortgage, deed of trust, vendor's lien, lien retained in deed or note, or other evidence of indebtedness secured thereby has been transferred or assigned.

(2) The memorandum shall be signed by the transferor or assignor, giving the name of the transferee or assignee, together with the date of the transfer or assignment, the signature to be attested and dated by the clerk.

(b) Where it shall appear from a memorandum endorsed upon the margin of the record and attested as provided in subsection (a) of this section that the mortgage, deed of trust, vendor's lien, or other evidence of indebtedness has been transferred, satisfaction shall be made by the party appearing therein as the transferee.

(c)(1) This section does not apply in counties which use other than paper recording systems.

(2) The clerks in counties that use other than paper recording systems shall not allow any marginal endorsements to be made after December 31, 1995.

(3) In counties which use other than paper recording systems, marginal endorsements made after December 31, 1995, are void.

History. Acts 1917, No. 374, § 2; C. & M. Dig., § 7399; Pope's Dig., § 9456; A.S.A. 1947, § 51-1016; Acts 1995, No. 1025, § 3.

A.C.R.C. Notes. As enacted by Acts 1995, No. 1025, § 3, subdivision (c)(1) began: "Effective January 1, 1996,".

CASE NOTES

ANALYSIS

Applicability.
Assignment.

Applicability.

This section does not apply to maker of a note or his heirs. *Vance v. White*, 180 Ark. 470, 180 Ark. 471, 21 S.W.2d 853 (1929); *Lehman v. First Nat'l Bank*, 189 Ark. 604, 74 S.W.2d 773 (1934).

Assignment.

The duty imposed upon the assignee of a mortgage to satisfy it when paid is not affected by the fact that his assignment is not of record. *Adams v. McKay & Binns Inv. Co.*, 155 Ark. 556, 244 S.W. 708 (1922).

The assignee of a note or debt secured by lien takes by the assignment, the lien securing the debt, but if he neglects to have the memorandum showing the transfer endorsed on the record, he is subject to have his lien defeated if satisfaction of the lien is endorsed by the apparent owner of the lien. *Kinney v. North Memphis Sav. Bank*, 178 Ark. 716, 11 S.W.2d 486 (1928); *Farmers' Bank & Trust Co. v. Taylor*, 189 Ark. 939, 75 S.W.2d 808 (1934).

Release by assignor even though assignment was not shown on record, was not a valid release when secured by false representations. *Rhine v. Mack*, 194 Ark. 606, 108 S.W.2d 1079 (1937).

18-40-107. Attestation of satisfaction — Separate release.

(a) In all cases in which the party receiving satisfaction of any indebtedness secured by mortgage, deed of trust, or lien affecting real

estate is required by law to acknowledge it on the margin of the record, the satisfaction shall be signed by the party and his or her signature shall be attested and dated by the clerk. The attestation by the clerk shall be evidence of the facts recited therein.

(b) The effectual discharge of any lien, deed of trust, or mortgage lien in note, bond, or other instrument may be made by a separate release deed or instrument duly executed, acknowledged, and recorded. This instrument when so recorded shall be of the same effect as a marginal entry.

(c)(1) Subsection (a) of this section does not apply in counties which use other than paper recording systems.

(2) In counties which use other than paper recording systems, the clerks shall not allow marginal notations of satisfaction of any indebtedness after December 31, 1995.

(3) In counties which use other than paper recording systems, marginal notations made after December 31, 1995, are void.

History. Acts 1917, No. 374, § 3; C. & M. Dig., § 7400; Pope's Dig., § 9457; A.S.A. 1947, § 51-1017; Acts 1995, No. 1025, § 4.

A.C.R.C. Notes. As enacted by Acts 1995, No. 1025, § 4, subdivision (c)(1) began: "Effective January 1, 1996,".

18-40-108. Validation of prior releases.

(a) All releases of mortgages, liens, liens under deeds of trust, vendor's liens, or other liens appearing upon the record, either upon the margin of the record of the instrument reserving the lien or by separate instrument upon the record, when appearing upon the record as of the date of the passage of this act, shall be valid and effectual as a release of the lien as fully as if executed by the person entitled to release it whether the releases purport to be executed by the:

- (1) Mortgagee, trustee, or the beneficiary in the lien;
- (2) Agent or attorney of the mortgagee, trustee, or beneficiary;
- (3) Circuit clerk or his or her deputy;
- (4) Assignee of any notes secured by the liens; or
- (5) Assignee of the instrument reserving a lien.

(b)(1) The clerks in counties which use other than paper recording systems shall not allow marginal releases to be entered after December 31, 1995.

(2) Marginal releases entered after December 31, 1995, are void.

History. Acts 1955, No. 101, § 2; A.S.A. 1947, § 51-1018; Acts 1995, No. 1025, § 5.

Publisher's Notes. Acts 1955, No. 101, § 2, provided, in part, that any person owning notes secured by the liens or who may be otherwise entitled to assert rights contrary to the releases should be permitted to bring suit for the purpose of canceling the release or asserting rights contrary thereto, if improperly made, within

six months from the passage of this act and not thereafter.

In reference to the term "date of passage of this act", Acts 1955, No. 101, was signed by the Governor on February 23, 1955, and became effective on June 9, 1955.

For prior validating acts see Acts 1917, No. 371, § 1; Acts 1937, No. 352, § 2; Acts 1941, No. 422, § 2; and Acts 1949, No. 291, § 2.

Meaning of "this act". Acts 1955, No. 101, codified as §§ 18-40-108 and 16-47-108.

RESEARCH REFERENCES

Ark. L. Rev. Validation of Instruments Affecting Title to Property, 9 Ark. L. Rev. 414.

18-40-109. Transfer, etc., by separate instrument.

(a)(1) No provision contained in §§ 18-40-103, 18-40-106, 18-40-107, and this section shall prevent any mortgagee, trustee, agent of owner of record, or the owner of record, transferee, or assignee appearing of record, from selling, transferring, or assigning any deed of trust, mortgage, or vendor's lien retained in deed by separate instrument duly acknowledged and recorded.

(2) At the time of recording any separate instrument transferring any mortgage, deed of trust, vendor's lien, or lien retained in deed, note, bond, or other instrument, the clerk and ex officio recorder in the office in which the transfer or assignment shall appear shall note on the margin of the record of the original mortgage, deed of trust, or deed retaining vendor's lien a memorandum noting that the lien contained in the instrument, and the notes or other instruments evidenced thereby, have been transferred, to whom transferred, the date of the transfer, and the book and page where the separate instrument and transfer may be found.

(3) The failure of the clerk and ex officio recorder to make the marginal entry or notation shall not invalidate the sale, transfer, or assignment recorded as provided in this section.

(b)(1) The clerks in counties which use other than paper recording systems shall not allow any assignment by marginal notation after December 31, 1995.

(2) Any such marginal notation entered after December 31, 1995, is void.

History. Acts 1917, No. 374, § 4; C. & A.S.A. 1947, § 51-1019; Acts 1995, No. M. Dig., § 7394; Pope's Dig., § 9451; 1025, § 6.

RESEARCH REFERENCES

Ark. L. Rev. Transmissibility of Certain Contingent Future Interests, 5 Ark. L. Rev. 111.

CASE NOTES

Assignment.

An assignment of a mortgage need not be recorded to be valid against later claims against the assignor. *Bryan v. Eas-*

ton Tire Co., 262 Ark. 731, 561 S.W.2d 79 (1978).

A note and mortgage are inseparable and an assignment of the note will carry

the mortgage, although an assignment of a mortgage alone is a nullity and, accordingly, a garnishment took priority over an assignment of a mortgage without the accompanying note. *Bryan v. Easton Tire Co.*, 262 Ark. 731, 561 S.W.2d 79 (1978).

18-40-110. Recording by public utilities covering property situated in more than one county.

(a) Every mortgage, deed of trust, and instrument supplementary thereto, amendatory thereof, or in satisfaction thereof, covering any real property situated in more than one (1) county in this state and made by a corporation subject to regulation by the Arkansas Public Service Commission, or its successor, shall be executed and acknowledged in the manner provided by law and may be recorded or filed in the office of the Secretary of State, but the recording or filing is not mandatory.

(b) The recording or filing of the instrument in the office of the Secretary of State shall be notice to all subsequent purchasers and encumbrancers of the rights and interests of the parties thereto as to property described in the recorded or filed instrument.

(c) A general description of the property of the mortgagor, rather than a specific description of each parcel or item, shall be an adequate description.

(d) Any such instrument previously recorded or filed in the office of the county recorder or circuit clerk of any county in this state may be rerecorded or refiled in the office of the Secretary of State in the manner provided in this section. The rerecording or refiled thereafter shall be of the same effect as to any property not previously released from the mortgage or deed of trust as if the instrument had been originally recorded or filed in the office of the Secretary of State.

(e) Any mortgage properly filed in the office of the Secretary of State in accordance with the provisions of this section shall be a lien on the mortgaged property from the time it is filed, and not before.

(f) Upon the filing of any instrument as provided in this section, there shall also be filed with the recorder of deeds of the county wherein the mortgaged property is situated a brief statement containing the names of the mortgagor and mortgagee and a description of the property. An adequate property description shall consist of language reading substantially as follows: "All property owned by mortgagor and situated in County, Arkansas."

(g) Instruments recorded or filed prior to July 24, 1973, shall not be affected by this section.

(h) All other laws not in conflict with this section which relate to the time when, or manner or place in which, mortgages, deeds of trust, or instruments supplementary thereto, amendatory thereof, or in satisfaction thereof are filed, executed, or acknowledged or which relate to the manner of endorsement of the record where the instrument is recorded shall be construed to apply to instruments recorded or filed in the office of the Secretary of State pursuant to this section.

History. Acts 1973, No. 252, §§ 1-3;
A.S.A. 1947, §§ 51-1020 — 51-1022.

CHAPTER 41

LANDLORDS' LIENS

- SECTION.
- 18-41-101. Lien on crop — Period effective.
- 18-41-102. Liability of subtenants.
- 18-41-103. Lien for advances — Enforcement.
- 18-41-104. Priority of tenant employees' liens.

- SECTION.
- 18-41-105. Waiver to be recited in mortgage.
- 18-41-106. Right to assign.
- 18-41-107. Purchasers or assignees from bailees.
- 18-41-108. Attachment to enforce.

Cross References. Laborer's lien on object, material, or property, § 18-43-102.

Lien on property left on leased premises, § 18-16-108.

Effective Dates. Acts 1860, No. 51, § 5: effective on passage.

Acts 1868, No. 67, § 2: effective on passage.

Acts 1875, No. 29, § 3: effective on passage.

Acts 1885, No. 134, § 4: effective on passage.

Acts 1935, No. 12, § 3: approved Feb. 4, 1935. Emergency clause provided: "Whereas, many landlords who hold rent contracts, notes, or other evidences of debt and lien for rent on lands rented by them, desire to pledge, mortgage or encumber said evidences of debt and liens, now given them under the law, and that said pledge is a necessary part of the financing of the interest of a landlord in the crops now growing and to be grown, an emergency is declared to exist, and all laws and parts of laws in conflict herewith, are hereby repealed and this act shall be in force and effect from and after its passage."

Acts 1935, No. 161, § 3: approved Mar. 20, 1935. Emergency clause provided: "It appearing that the Government Agencies have practically completed ten thousand loans in this State to farmers and tenants and that the passage of Act No. 32 of the

Fiftieth General Assembly will require all of these loans to be re-negotiated, many papers will have to be signed, causing confusion, loss of time and money, an emergency is hereby declared, and this act shall take effect and be in full force from and after its passage."

Acts 2003, No. 32, § 5: Feb. 3, 2003. Emergency clause provided: "It is found and determined by the General Assembly that inadvertent changes to the Uniform Commercial Code-Secured Transactions by the Eighty-Third General Assembly substantially altered the traditional method for establishing landlords' liens on crops which has been operating in this state for over one hundred years. The inadvertent changes have resulted in widespread confusion which threatens to seriously disrupt the traditional process of crop loans and farm land tenancy in this state's largest industry. This confusion and unintended result will continue until this act becomes effective. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

RESEARCH REFERENCES

Am. Jur. 49 Am. Jur. 2d, L & T, § 790 et seq.

Ark. L. Rev. Secured Transactions: Article IX: Part 1, 16 Ark. L. Rev. 108.

Secured Transactions Under the Uniform Commercial Code (Harry E. Meek), 18 Ark. L. Rev. 30.

Creditors' Provisional Remedies and Debtors' Due Process Rights: Statutory Liens in Arkansas, 32 Ark. L. Rev. 185.

Nickles, A Localized Treatise on Secured Transactions — Part 1: Scope of Article 9, 34 Ark. L. Rev. 377.

Looney, Legal and Economic Considerations in Drafting Arkansas Farm Leases, 35 Ark. L. Rev. 395.

C.J.S. 52A C.J.S., L & T, § 1369 et seq.

18-41-101. Lien on crop — Period effective.

(a) Every landlord shall have a lien upon the crop grown upon the demised premises in any year for rent that shall accrue for the year.

(b)(1) The lien is perfected and shall have priority over a conflicting security interest in or agricultural lien on the crop regardless of when the conflicting security interest or agricultural lien is perfected.

(2) The lien shall continue for six (6) months after the rent shall become due and payable, and no longer.

History. Acts 1868, No. 67, § 1, p. 245; C. & M. Dig., § 6889; Pope's Dig., § 8845; A.S.A. 1947, § 51-201; Acts 2003, No. 32, § 3.

A.C.R.C. Notes. Acts 2003, No. 32, § 1, provided: "The General Assembly has determined that by the enactment of Act 1439 of 2001 it inadvertently changed the law regarding landlords' liens on crops. It is the intent of this act to correct that inadvertent change, remove landlords'

liens on crops from the application of the Uniform Commercial Code, reestablish Arkansas Code 18-41-101 and 18-41-103 as the law applicable to landlords' liens on crops, and thereby make landlords' liens under Arkansas Code 18-41-101 and 18-41-103 superior to all other liens on the same collateral."

Cross References. Lien of employer on crops when no written contract, § 18-42-110.

RESEARCH REFERENCES

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Ark. L. Rev. Casenote, Get Down and Dirty: The Eighth Circuit's Admonition to Farmers Seeking the Protection of Chapter 12, 43 Ark. L. Rev. 701.

Note, Nef v. Ag Services of America, Inc.: Revised Article 9 Brings Uncertainty to Holders of Agricultural Landlord's Liens, 56 Ark. L. Rev. 871 (2004).

CASE NOTES

ANALYSIS

Applicability.
 Accounting.
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 Attachment of Lien.
 Extent of Lien.
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 Limitation of Actions.
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 Title to Crop.
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Applicability.

The statute applies only in situations where there exists a landlord-tenant relationship created by express or implied contract and no such relationship exists where the defendant is a judgment debtor who has remained in possession following the sale of his property under execution. *Kelly v. Weir*, 243 F. Supp. 588 (E.D. Ark. 1965).

Land that was owned by the individual partners, all members of the same family, that was never formally deeded to the partnership did not preclude the partnership from acting as a landlord for the property with the ability to enter into a lease agreement and to enforce a lien for rent under § 18-41-101 when the evidence established the owners' intent to have the partnership act accordingly. *Bank of McCrory v. Morrison* (In re James), 368 B.R. 800 (Bankr. E.D. Ark. 2007).

Accounting.

A tenant who agrees to pay as rent part of crop raised by him on the land or its value cannot refuse to account for it because that portion could not be gathered without much inconvenience and unusual expense. To excuse a failure to perform the contract, the tenant must show that it was caused by the act of God, of the landlord, or of the public enemy. *Johnson v. Bryant*, 61 Ark. 312, 32 S.W. 1081 (1895).

Landlord must account to a junior lienor for the surplus of the crop. *Peeples v. Hayley-Beine & Co.*, 89 Ark. 252, 116 S.W. 197 (1909).

Assignment.

For cases discussing effect on lien of assignment of rent debts, prior to enactment of § 18-41-106, see *Nolen v. Royston*, 36 Ark. 561 (1880); *Meyer v. Bloom*, 37 Ark. 43 (1881); *Varner v. Rice*, 39 Ark. 344 (1882); *Dickinson v. Harris*, 52 Ark. 58, 11 S.W. 965 (1889); *Block v. Smith*, 61 Ark. 266, 32 S.W. 1070 (1895); *Smith v. Johnson*, 153 Ark. 262, 239 S.W. 1056 (1922).

Attachment of Lien.

Lien becomes a charge on the crop as soon as the crop comes into existence. *Murphy v. Myar*, 95 Ark. 32, 128 S.W. 359 (1910).

Extent of Lien.

A rent contract which includes other indebtedness expressed as rent is a lien on the tenant's crop only for the amount of the actual rent. *Roth & Co. v. Williams*, 45 Ark. 447 (1885).

Landlord has lien only on crop grown in a year for which rent is due. *Mills v. Pryor*, 65 Ark. 214, 45 S.W. 350 (1898); *Henry v. Irby*, 170 Ark. 928, 282 S.W. 3 (1926).

The lien is confined to the rent and advances necessary to make and gather the crop, and cannot be made to cover damages for breach of the lease. *Few v. Mitchell*, 80 Ark. 243, 96 S.W. 983 (1906).

A contract requiring the lessee to repair the fence is part of the price of the rent for which the landlord has a lien. *Von Berg v. Goodman*, 85 Ark. 605, 109 S.W. 1006 (1908).

There is a lien on the entire crop for the rent whether the crop is raised by a tenant or a subtenant. *Jacobson v. Atkins*, 103 Ark. 91, 146 S.W. 133 (1912).

Where rent is payable in money, the landlord has a lien for all the rent on the crop raised even though part of the land was not cultivated by the tenant. *Stephenson v. Lewis*, 152 Ark. 361, 238 S.W. 61 (1922).

Where part of rented land was kept out of production and rented to federal government by agreement between landlord and tenant, a landlord's lien for the rent of such land could not be asserted against crops raised on other parts of the land by tenant's sharecroppers. *Dulaney v. Balls*, 193 Ark. 701, 102 S.W.2d 88 (1937).

Landlord's Remedies.

Where a tenant's crop was purchased and sold with knowledge that rent was due and unpaid, the landlord's remedy, if any, is by specific attachment of the crop while it is in the purchaser's hands, or by bill in equity after a sale, to have the proceeds appropriated to payment of rents, but not an action for money had and received. *Reavis v. Barnes*, 36 Ark. 575 (1880); *Anderson & Co. v. Bowles*, 44 Ark. 108 (1884).

A vendee, with notice, selling tenant's crop is liable for conversion. *Merchants' & Planters' Bank v. Meyer*, 56 Ark. 499, 20 S.W. 406 (1892).

Landlord cannot sue trespasser for damages to tenant's crop. *St. Louis, Ark. & Tex. Ry. v. Trigg*, 63 Ark. 536, 40 S.W. 579 (1897).

Where a tenant delivers his crop to a mortgagee without having first discharged the landlord's lien, the landlord's remedy is a specific attachment of the cotton in the mortgagee's hands. *Ferniman v. Nowlin*, 91 Ark. 20, 120 S.W. 378 (1909).

A cause of action of a landlord having a lien on his tenant's crop against a bank for receiving the proceeds of sale of the crop with notice of the lien is barred by the six months statute of limitations; the remedy being in equity to impress a lien upon the proceeds of the crop in the bank's hands. *Bottrell v. Farmers' Bank & Trust Co.*, 172 Ark. 1165, 291 S.W. 832 (1927).

Where a tenant removed a portion of the crop without authority at a time when he was indebted to the landlord for rent, the landlord was entitled to attach crops grown on the premises by virtue of the lien thereon. *Stone v. Yount*, 174 Ark. 825, 296 S.W. 717 (1927).

Where during the pendency of a landlord's attachment suit to enforce his landlord's lien for rent and supplies, the tenant took the property out of the custody of the court and converted it to his own use, the landlord's remedy was by a bill in equity after the sale to have the proceeds appropriated to the payment of his rents. *Clemmons v. Byars*, 197 Ark. 300, 122 S.W.2d 652 (1938).

Limitation of Actions.

An action by the landlord against one taking the crop with a knowledge of the existence of the lien will be barred in six

months after the maturity of the rent. *King & Clopton v. Blount*, 37 Ark. 115 (1881).

The lien expires in six months after the rent is due. *Cocke v. Clausen*, 67 Ark. 455, 55 S.W. 846 (1900); *Taylor v. Crawford*, 187 Ark. 316, 59 S.W.2d 484 (1933).

Priority.

The lien of a landlord is superior to a mortgage on the crop by the tenant. *Tomlinson v. Greenfield*, 31 Ark. 557 (1876); *Lambeth v. Ponder*, 33 Ark. 707 (1878); *Watson v. Johnson*, 33 Ark. 737 (1878); *Meyer v. Bloom*, 37 Ark. 43 (1881).

The lien provided by this section and the one provided by § 18-41-103 are of equal dignity and are prior to the lien of a mortgage on the crop by the tenant. *Morgan v. Russell*, 151 Ark. 405, 236 S.W. 602 (1922).

A landlord's lien on his tenant's crop is superior to the lien of laborers asserting liens thereon. *Campbell v. Anderson*, 189 Ark. 671, 74 S.W.2d 782 (1934).

Landlords' lien interest in the crop proceeds took priority over a perfected security interest that a creditor bank had in the same proceeds, regardless of when the bank's conflicting security interest was perfected. *Bank of McCrory v. Morrison (In re James)*, 368 B.R. 800 (Bankr. E.D. Ark. 2007).

Public Grain Warehouse Law.

While lessor may have come within the definition of "owner" as set forth in § 2-17-301(3) because of an interest in the grain under its statutory landlord's lien, under this section, this lien existed for only six months. *Rufus Comer Farms v. First State Bank*, 47 Ark. App. 3, 884 S.W.2d 265 (1994).

Sale of Crop.

The landlord's lien is not lost by the tenant's sale of the crop to a purchaser with notice. *Volmer v. Wharton*, 34 Ark. 691 (1879).

The statutory lien of a landlord for rent and supplies furnished is not enforceable against one who purchased the crops from the tenant in good faith and without notice of the landlord's claim. *Hunter v. Matthews*, 67 Ark. 362, 55 S.W. 144 (1900).

One who purchased cotton which he knew was grown on rented land and who had notice of facts sufficient to put him on

inquiry could not, as against landlord's lien, claim that he was an innocent purchaser because the tenant misled him into thinking that landlord had abandoned his claim for rent. *Pape v. Steward*, 69 Ark. 306, 63 S.W. 47 (1901).

A purchaser of a tenant's crop takes charge with notice of the landlord's lien if he knew that the relation of landlord and tenant had existed during the previous year and had no reason to believe that such relationship had ceased to exist. *Judge v. Curtis*, 72 Ark. 132, 78 S.W. 746 (1904).

Where a landlord attaches cotton in the hands of a purchaser who is not an innocent purchaser, and such purchaser executes a forthcoming bond and sells the cotton, he becomes liable to the landlord for the amount due him for rents and supplies. *First Nat'l Bank v. Duvall*, 156 Ark. 377, 246 S.W. 471 (1923).

Where tenants who had right to sell crops grown on rented farmland had previously paid the rent on time, no action on part of the landlords to protect their lien as against buyer of crops was required; and the buyer, which was unquestionably on notice that landlords' lien existed, was not entitled to ignore the lien. *Holmes v. Riceland Foods, Inc.*, 261 Ark. 27, 546 S.W.2d 414 (1977).

Under this section, the trust's statutory lien was not enforceable against the buyer because it bought rice from the tenant in good faith and had no evidence which would require the buyer to make an investigation regarding a landlord's lien. *Riceland Foods, Inc. v. Pearson*, 2009 Ark. 520, 357 S.W.3d 434 (2009).

Sale of Land.

Vendor of land reserving lien on crops has equitable mortgage even though it is called landlord's lien in the conveyance. *Martin v. Schichtl*, 60 Ark. 595, 31 S.W. 458 (1895).

Landlord's lien cannot arise in sale of land. *Smith v. Maberry*, 61 Ark. 515, 33 S.W. 1068 (1896).

Tender of Rent.

The mortgagee cannot recover the crop from one holding it for payment of rent, without first tendering the rent due. *Buck v. Lee*, 36 Ark. 525 (1880).

The landlord's lien is not extinguished by a refusal to accept a tender of the rent and to make a plea of such tender available, the money must be paid into court. *Bloom v. McGehee*, 38 Ark. 329 (1881).

Title to Crop.

Legal title to cotton grown by tenant is in him until disposed of and landlord has a lien, enforceable within six months from due date of rent. *Commodity Credit Corp. v. Usrey*, 199 Ark. 406, 133 S.W.2d 887 (1939).

Waiver.

A landlord does not waive his lien by taking a mortgage on the crop. *Franklin v. Meyer*, 36 Ark. 96 (1880); *Merchants' & Planters' Bank v. Meyer*, 56 Ark. 499, 20 S.W. 406 (1892).

A landlord by consenting to the removal and sale of a crop of cotton upon which he has a lien for rents loses his lien as against one purchasing the cotton, or advancing money upon it as a security in good faith and without notice of the lien. *May v. McGaughey*, 60 Ark. 357, 30 S.W. 417 (1895).

Waiver of landlord's lien in favor of mortgagee is personal, and does not pass with assignment of the deed of trust. *Neeley v. Phillips*, 70 Ark. 90, 66 S.W. 349 (1902).

Lien is waived by receiving proceeds of sale of a crop of cotton. *Noe v. Layton*, 76 Ark. 582, 89 S.W. 1005 (1905).

A landlord who agrees that a part of a subtenant's crop shall be applied to the claim of a supply merchant does not thereby waive his lien on the remainder of such crop. *Jacobson v. Atkins*, 103 Ark. 91, 146 S.W. 133 (1912).

The lien is not waived by taking a note with personal security, in the absence of proof that it was so intended by the parties. *Cole v. Turner*, 108 Ark. 537, 158 S.W. 493 (1913).

A landlord's statutory lien is paramount lien of which every person must take notice and generally can be lost only by waiver or failure to enforce it at the proper time. *Blackwood v. Farmers Bank & Trust Co.*, 200 Ark. 738, 141 S.W.2d 1 (1940).

Cited: *McIllwain v. Welco Rice Milling Co.*, 266 Ark. 991, 588 S.W.2d 459 (Ct. App. 1979); *Nef v. Ag Servs. of Am., Inc.*, 79 Ark. App. 100, 86 S.W.3d 4 (2002).

18-41-102. Liability of subtenants.

Any person subrenting lands or tenements shall be held responsible only for the rent of lands and tenements cultivated or occupied by him or her.

History. Acts 1868, No. 67, § 1, p. 245; C. & M. Dig., § 6892; Pope's Dig., § 8848; A.S.A. 1947, § 51-202.

CASE NOTES

ANALYSIS

Construction.
Lien.

Construction.

The words "cultivated or occupied" mean the quantity of land which the subtenant contracts to take. *Storthz v. Smith*, 109 Ark. 552, 161 S.W. 183 (1913).

Lien.

The landlord has a lien on the crop raised by the subtenant for the rent of the

land for his proportionate part of the rent and that lien is superior to that of mortgage on the subtenant's crop. *Morgan v. Russell*, 151 Ark. 405, 236 S.W. 602 (1922).

Landlord's lien against subtenant is enforceable against bank using proceeds of crop. *Miller County Bank & Trust Co. v. Beasley*, 165 Ark. 44, 262 S.W. 981 (1924).

Cited: *Watkins v. Wells*, 172 Ark. 696, 290 S.W. 593 (1927); *Dulaney v. Balls*, 193 Ark. 701, 102 S.W.2d 88 (1937).

18-41-103. Lien for advances — Enforcement.

(a)(1) In addition to the lien given by law to landlords, if any landlord, to enable his or her tenant or employee to make and gather the crop, shall advance the tenant or employee any necessary supplies, either of money, provisions, clothing, stock, or other necessary articles, the landlord shall have a lien upon the crop raised upon the premises for the value of the advances.

(2) The lien is perfected and shall have priority over a conflicting security interest in or agricultural lien on the crop regardless of when the conflicting security interest or agricultural lien is perfected.

(b) This lien shall have preference over any mortgage or other conveyance of the crop made by the tenant or employee.

(c) This lien may be enforced by an action of attachment before any court or justice of the peace having jurisdiction, and the lien for advances and for rent may be joined and enforced in the same action.

History. Acts 1885, No. 134, § 1, p. 225; C. & M. Dig., § 6890; Pope's Dig., § 8846; A.S.A. 1947, § 51-203; Acts 2003, No. 32, § 4.

A.C.R.C. Notes. Acts 2003, No. 32, § 1, provided: "The General Assembly has determined that by the enactment of Act 1439 of 2001 it inadvertently changed the law regarding landlords' liens on crops. It is the intent of this act to correct that inadvertent change, remove landlords'

liens on crops from the application of the Uniform Commercial Code, reestablish Arkansas Code 18-41-101 and 18-41-103 as the law applicable to landlords' liens on crops, and thereby make landlords' liens under Arkansas Code 18-41-101 and 18-41-103 superior to all other liens on the same collateral."

Cross References. Liens of employers and employees under contract, § 18-42-101 et seq.

RESEARCH REFERENCES

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CASE NOTES

ANALYSIS

Advances.
—Necessity.
Cotenants.
Enforcement of Lien.
Failure to Raise Crop.
Priority.
Sale of Crop.
Sale of Land.
Waiver.

Advances.

Money furnished to a tenant to make necessary repairs which the landlord was not bound by his contract to make is an advancement. *Airey v. Weinstein*, 54 Ark. 443, 16 S.W. 123 (1891).

The fact that the landlord gave security for a horse purchased by the tenant did not give him a lien as for supplies. *Kaufman & Willson v. Underwood*, 83 Ark. 118, 102 S.W. 718 (1907).

A landlord who signed a note as surety for his tenant to secure rice bags to enable his tenant to preserve his rice crop and who was in effect primarily liable on the note was, on paying the note, entitled to a lien on the rice therefor. *Bank of Gillett v. Botts*, 157 Ark. 478, 248 S.W. 573 (1923).

A landlord is not entitled to a lien on his tenant's crop for money advanced to enable the tenant to make a pleasure trip. *Etheridge v. Bird Bros.*, 176 Ark. 649, 4 S.W.2d 9 (1928).

Where landlord endorsed note for tenants to enable tenants to have combine repaired and paid the note upon default of tenants, landlord was entitled to landlord's lien on crop raised. *Grisham Butane Gas Co. v. Mason*, 224 Ark. 969, 278 S.W.2d 102 (1955).

—Necessity.

The landlord has a lien for the price of any article furnished which was reasonably necessary in making or gathering the crop, and it is not essential that the article furnished shall have been for direct use in the cultivation. *Earl Bros. & Co. v. Malone*, 80 Ark. 218, 96 S.W. 1062 (1906).

Landlord must prove that the supplies furnished were reasonably necessary to enable the tenant to make the crop. *Smith v. Johnson*, 153 Ark. 262, 239 S.W. 1056 (1922).

Cotenants.

Where one of two cotenants who leased land to a defendant to make crop furnishes supplies for that purpose, he will be entitled to a lien for the supplies furnished. *Malone v. Wade*, 148 Ark. 548, 230 S.W. 579 (1921).

Enforcement of Lien.

The lien of the landlord must be enforced in the mode pointed out by this section, since he has no title to the crop even though the tenant surrendered possession. *Upham v. Dodd*, 24 Ark. (11 Barber) 545 (1867).

Landlord in possession of crop by consent may retain it till lien for supplies is discharged. *Noe v. Layton*, 69 Ark. 551, 64 S.W. 880 (1901).

Failure to Raise Crop.

This section gives the landlord a lien upon the crop raised upon the premises and not upon the things advanced; therefore, if no crop is raised upon the premises, there can be no lien. *Laughlin v. Tyler*, 177 Ark. 1183, 9 S.W.2d 567 (1928).

Priority.

Where a landlord brought suit seeking to enforce his lien on his tenant's crop for supplies furnished for the purpose of making such crop and a mortgagee of the crop brought replevin against the landlord for the possession of the crop, the landlord's lien was paramount to the mortgage lien and the judgment was properly rendered enforcing the landlord's lien. *Ferniman v. Nowlin*, 91 Ark. 20, 120 S.W. 378 (1909).

Where a tenant to whom the landlord had made advances went to war and his father took over his crop and cultivated and gathered it, the landlord's lien for rent and advances was superior to the rights of the father. *Embry v. Neighbors*, 139 Ark. 313, 213 S.W. 741 (1919).

The lien provided by this section and the one provided by § 18-41-101 are of equal dignity and are prior to the lien of a mortgage on the crop by the tenant. *Morgan v. Russell*, 151 Ark. 405, 236 S.W. 602 (1922).

A landowner's right to a lien for advances on a sharecropper's interest in the crop is superior to the lien of laborers. *Campbell v. Anderson*, 189 Ark. 671, 74 S.W.2d 782 (1934).

Sale of Crop.

One who purchases a tenant's crops under circumstances that would put him on notice of his landlord's lien for supplies takes subject thereto. *Neal v. Brandon*, 70 Ark. 79, 66 S.W. 200 (1902).

Purchasers of the crop who paid proceeds to landlord were not bound to take notice of any waiver other than an endorsement of waiver and were only bound to show as against other liens the existence of a valid lien on the part of the landlord in an amount equal to or greater than the price paid by them in purchasing the crop. *Chronister Bros. & Co. v. Oswalt*, 175 Ark. 337, 299 S.W. 9 (1927).

Sale of Land.

A purchaser of rented land from the owner, who pays the landlord, as part of

the purchase price of the land, the amount the tenants owe him for supplies, is entitled to a lien on the crops as against mortgagees thereof. *Oberste Bros. v. Crabtree*, 175 Ark. 107, 299 S.W. 6 (1927).

Waiver.

A landlord may waive his lien for advances to an employee only by written endorsement upon the mortgage or other instrument by which the employee transfers his interest in crops. *Tinsley v. Craig*, 54 Ark. 346, 15 S.W. 897 (1891). But see, *Griggs v. Horton*, 84 Ark. 623, 104 S.W. 930 (1907).

Where a landlord agrees to a transfer of the lease from the tenant to a subtenant, and recovers judgment against the tenant and the tenant's surety, the landlord will be held to have waived, by his conduct, his landlord's lien upon the crops of his tenants. *Cole v. Turner*, 108 Ark. 537, 158 S.W. 493 (1913).

Proof of a landlord's knowledge that her tenant was being furnished supplies by a mercantile firm would not establish a waiver of the landlord's lien. *Fletcher v. Dunn*, 188 Ark. 734, 67 S.W.2d 579 (1934).

Cited: *Lunsford v. Skelton*, 169 Ark. 547, 275 S.W. 901 (1925); *Logue v. Hill*, 218 Ark. 797, 238 S.W.2d 753 (1951).

18-41-104. Priority of tenant employees' liens.

(a) Whenever any landlord shall endorse, upon any written agreement made by and between his or her tenant and the employees of the tenant, his or her written consent to the terms of the agreement, then, and in that case only, the lien of the employees shall have precedence over that of the landlord.

(b) This precedence shall be only for the compensation specified in the agreement, the services therein specified having been rendered towards the production of the crop against which the landlord's lien attaches.

History. Acts 1875, No. 29, § 2, p. 84; C. & M. Dig., § 6891; Pope's Dig., § 8847; A.S.A. 1947, § 51-204.

18-41-105. Waiver to be recited in mortgage.

If any mortgagee procures a waiver of the landlord's lien, in part or in full, he or she shall recite it in his or her mortgage. If the waiver of lien is not recited in the mortgage, or attached thereto, the waiver shall be invalid against any subsequent mortgagee, purchaser, or assignee.

History. Acts 1935, No. 161, § 1; Pope's Dig., § 8857; A.S.A. 1947, § 51-212.

CASE NOTES

Cited: *McIllwain v. Welco Rice Milling Co.*, 266 Ark. 991, 588 S.W.2d 459 (Ct. App. 1979).

18-41-106. Right to assign.

(a) A landlord's lien for rent shall be assignable.

(b) The holder of any note, contract, or other instrument evidencing the rent for land upon which crops are to be produced during any year may sell, assign, transfer, mortgage, or pledge the note, contract, or other evidence thereof, together with the lien, if any, provided by law in favor of landlords, and the transferee, endorsee, mortgagee, pledgee, or holder thereof shall have the right to enforce the lien so transferred.

History. Acts 1935, No. 12, §§ 1, 2; Pope's Dig., §§ 8858, 8859; A.S.A. 1947, §§ 51-210, 51-211.

RESEARCH REFERENCES

Ark. L. Rev. Transmissibility of Certain Contingent Future Interests, 5 Ark. L. Rev. 111.

18-41-107. Purchasers or assignees from bailees.

The purchaser or assignee of the receipt of any ginner, warehouse, cotton factor, or other bailee for any cotton, corn, or other farm products in store or custody of the ginner, warehouse, cotton factor, or other bailee shall not be held to be an innocent purchaser of any such produce against the lien of any landlord or laborer.

History. Acts 1885, No. 134, § 3, p. 225; C. & M. Dig., § 6893; Pope's Dig., § 8849; A.S.A. 1947, § 51-205.

Publisher's Notes. This section may be superseded by § 4-7-101 et seq., as to

negotiable warehouse receipts, bills of lading, and other documents of title. See *Grauman v. Johnson*, 216 Ark. 362, 225 S.W.2d 678 (1950).

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Adams, "Clear Title" for Farm Products: Congress and the Arkansas Legislature Attempt to

Solve a Troublesome Problem, 10 U. Ark. Little Rock L.J. 619.

CASE NOTES

ANALYSIS

Agency.

Negotiable Warehouse Receipts.

Agency.

Where ginner held goods for sale as landlord's agent, credit corporation making loan to ginner on strength of warehouse receipts without knowledge of reservations attaching to ginner's authority as landlord's agent was not bound thereby and held receipt free of landlord's lien for rent. *Commodity Credit Corp. v. Usrey*, 199 Ark. 406, 133 S.W.2d 887 (1939).

Negotiable Warehouse Receipts.

The Uniform Warehouse Receipts Act (repealed — now see § 4-7-101 et seq.) repealed this section insofar as it makes landlord's rights superior to those of the ginner, the factor or the warehouseman, whenever a negotiable warehouse receipt is involved. *Grauman v. Jackson*, 216 Ark. 362, 225 S.W.2d 678 (1950).

Cited: *Noe v. Layton*, 69 Ark. 551, 64 S.W. 880 (1901); *Lynch v. Mackey*, 151 Ark. 145, 235 S.W. 781 (1921).

18-41-108. Attachment to enforce.

(a) Any landlord who has a lien on the crop for rent shall be entitled to bring suit before a justice of the peace or in the circuit court, as the case may be, and have a writ of attachment for the recovery of it, whether the rent is due or not, in the following cases:

(1) When the tenant is about to remove the crop from the premises without paying the rent; or

(2) When he or she has removed the crop, or any portion thereof, without the consent of the landlord.

(b)(1) Before the writ of attachment shall issue, the landlord or his or her agent or attorney shall make and file an affidavit of one (1) of the facts provided for in subdivision (a)(1) or subdivision (a)(2) of this section, that the amount claimed which shall be therein stated is or will be due for rent, or will be the value of the portion of the crop agreed to be received as rent, stating the time when the rent became or would become due and that he or she has a lien on the crop for rent.

(2) The landlord or his or her agent or attorney shall file with the justice or clerk, as the case may be, a bond to the defendant, with sufficient security, in double the amount of his or her claim, as sworn to, conditioned that he or she will prove his or her debt or demand and his or her lien in a trial of law, or that he or she will pay damages as shall be adjudged against him or her.

(c) The writ of attachment may be levied on the crop in the possession of the tenant or anyone holding it in his or her right or in the possession of a purchaser from him or her with notice of the lien of the landlord.

(d) If the rent shall not be due at the commencement of the suit, the trial shall be stayed until it becomes due, and the attachment, at any time before final trial, may be dissolved in the manner prescribed by law, and the cause proceed as other suits.

History. Acts 1860, No. 51, §§ 1-4, p. 206 — 51-209. Dig., §§ 8853-8856; A.S.A. 1947, §§ 51-206 — 51-209.

CASE NOTES

ANALYSIS

Damages.
Dissolution.

Damages.

If attachment is sustained, there can be no damages for its wrongful issuance or levy. *Stone v. Yount*, 174 Ark. 825, 296 S.W. 717 (1927).

Where defendant filed a cross-complaint for damages resulting from the attachment on crops, conflicting evidence about the amount of damages made

amount thereof question for jury. *Burns v. Thompson*, 200 Ark. 901, 141 S.W.2d 530 (1940).

Dissolution.

The manner of dissolving attachments before trial provided by law is to execute the bond authorized by § 16-110-122, and the provisions of that section apply in cases of attachments for rent as in other attachment cases. *Cole v. Tipton*, 196 Ark. 1177, 114 S.W.2d 464 (1938).

Cited: *Ferniman v. Nowlin*, 91 Ark. 20, 120 S.W. 378 (1909).

CHAPTER 42

LIENS OF EMPLOYERS AND EMPLOYEES UNDER CONTRACT

SECTION.

- 18-42-101. Contracts for more than one year to be in writing.
- 18-42-102. Contracts of minors.
- 18-42-103. Out-of-state contracts binding.
- 18-42-104. Filing and indexing of contracts.
- 18-42-105. Reservation of lien.

SECTION.

- 18-42-106. Penalty for fraudulent disposition.
- 18-42-107. Discharge of laborer before expiration of contract.
- 18-42-108. Abandonment by employee.
- 18-42-109. Proceedings to enforce liens.
- 18-42-110. Lien of employer on crop when no written contract.

Cross References. Laborers' lien for work and labor under written or verbal contract, § 18-43-101.

Effective Dates. Acts 1883, No. 96, § 10: effective on passage.

RESEARCH REFERENCES

Ark. L. Rev. Youngdahl, The Erosion of the Employment-At-Will Doctrine in Arkansas, 40 Ark. L. Rev. 545.

CASE NOTES

Contract for One Year or Less.

The 1887 amendment to § 18-42-101, which changed the contractual period requiring a writing from one month to one

year applied to the entire chapter. *Mondschien v. State*, 55 Ark. 389, 18 S.W. 383 (1892).

18-42-101. Contracts for more than one year to be in writing.

A contract for services or labor for a period longer than one (1) year shall not entitle the parties to the benefits of this chapter unless the contract is in writing, signed by the parties, and witnessed by two (2) disinterested witnesses or acknowledged before an officer authorized by law to take an acknowledgment.

History. Acts 1883, No. 96, § 2, p. 176; A.S.A. 1947, §§ 51-502, 51-503; Acts 2005, 1887, No. 78, § 1, p. 108; C. & M. Dig., No. 917, § 1. §§ 6879, 6880; Pope's Dig., §§ 8835, 8836;

18-42-102. Contracts of minors.

(a) The contract of a minor when approved by the parent having control of the minor, or, in case there is no parent, when approved by his or her guardian, or the contract of a minor over fifteen (15) years of age having neither a parent or guardian shall be binding.

(b) However, a contract with the minor shall not be for a longer period than one (1) year.

History. Acts 1883, No. 96, § 2, p. 176; C. & M. Dig., § 6881; Pope's Dig., § 8837; A.S.A. 1947, § 51-504. Arkansas Democrat Co., 242 Ark. 133, 497, 413 S.W.2d 629 (1967).

Publisher's Notes. This section was held to be superseded as to employment contracts with minors under fourteen years of age by § 11-6-104 in Clark v.

Cross References. Age of majority, § 9-25-101.

Employment of children, § 11-6-101 et seq.

CASE NOTES**Minors Under Fourteen Years of Age.**

Insofar as this section authorizes an employment contract with a minor under fourteen years of age, it has been super-

seded by § 11-6-104. Clark v. Arkansas Democrat Co., 242 Ark. 133, 413 S.W.2d 629 (1967).

18-42-103. Out-of-state contracts binding.

Contracts made with laborers or employers beyond the limits of this state for labor or services to be performed in this state shall be as binding as if entered into within this state.

History. Acts 1883, No. 96, § 1, p. 176; C. & M. Dig., § 6878; Pope's Dig., § 8834; A.S.A. 1947, § 51-501.

18-42-104. Filing and indexing of contracts.

(a) A copy of the contract or the original shall be filed in the recorder's office of the proper county. The filing shall be sufficient notice of the existence of the lien.

(b) No third party shall be prejudiced by the existence of the lien, nor in any manner liable under a provision of this chapter unless a copy of the contract is filed in the recorder's office as provided.

History. Acts 1883, No. 96, § 4, p. 176; §§ 8839, 8840; A.S.A. 1947, § 51-506; C. & M. Dig., §§ 6883, 6884; Pope's Dig., Acts 2005, No. 917, § 2.

18-42-105. Reservation of lien.

Specific liens are reserved upon so much of the produce raised and articles constructed or manufactured by laborers during their contract as will secure all moneys, the value of all supplies furnished them by the employers, and all wages or shares due the laborer.

History. Acts 1883, No. 96, § 3, p. 176; C. & M. Dig., § 6882; Pope's Dig., § 8838; A.S.A. 1947, § 51-505.

18-42-106. Penalty for fraudulent disposition.

(a) If either party, before settlement, shall dispose of or appropriate any of the things set forth in § 18-42-105 without the consent of the other so as to defraud him or her of the amount due, that party shall be deemed guilty of a misdemeanor and upon conviction may be fined not exceeding one hundred dollars (\$100) and confined in the county jail not less than one (1) month nor more than six (6) months.

(b) Nothing in this section shall be so construed as forbidding the laborer from mortgaging so much of his or her crop for necessary supplies as may be equal to his or her interest therein at the time, if the employer having contracted to furnish the supplies fails or refuses to do so.

History. Acts 1883, No. 96, § 3, p. 176; C. & M. Dig., § 6882; Pope's Dig., § 8838; A.S.A. 1947, § 51-505.

18-42-107. Discharge of laborer before expiration of contract.

If any employer, without good cause, shall dismiss a laborer prior to the expiration of his or her contract, unless by agreement, he or she shall be liable to the laborer for the full amount that would have been due him or her at the expiration thereof, and the laborer shall be entitled to the lien provided in § 18-42-105 for the enforcement of the liability.

History. Acts 1883, No. 96, § 5, p. 176; C. & M. Dig., § 6885; Pope's Dig., § 8841; A.S.A. 1947, § 51-507.

18-42-108. Abandonment by employee.

If any laborer, without good cause, shall abandon his or her employer before the expiration of his or her contract, he or she shall be liable to his or her employer for the full amount of any account he or she may owe his or her employer and shall forfeit to his or her employer all

wages or share of crop due him or her, or which might become due him or her, from his or her employer.

History. Acts § 1883, No. 96, § 6, p. 176; C. & M. Dig., § 6886; Pope's Dig., § 8842; A.S.A. 1947, § 51-508.

CASE NOTES

ANALYSIS

Compensation.
Sharecroppers.

Compensation.

A laborer employed for a definite time who abandons his employer without good cause is not entitled to compensation for services rendered, either on the contract or on quantum meruit. *Latham v. Barwick*, 87 Ark. 328, 113 S.W. 646 (1908).

Sharecroppers.

Where a laborer contracted to make a crop and his wife and children rendered

assistance in planting and working the crop until midseason when all abandoned the crop after a quarrel with the employer, the wife and children could not maintain a lien on the crop for their labor. *Rand v. Walton*, 130 Ark. 431, 197 S.W. 852 (1917).

A landlord and sharecropper stand in relation of employer and employee; consequently, where sharecropper abandons his crop, it is forfeited to landlord. *Crawford v. Slaten*, 155 Ark. 283, 244 S.W. 32 (1922).

18-42-109. Proceedings to enforce liens.

Proceedings for the enforcement of liens provided for in this chapter shall be governed in the circuit court by the law regulating mechanics' liens and before justices of the peace by the law regulating attachments before justices.

History. Acts 1883, No. 96, § 7, p. 176; C. & M. Dig., § 6887; Pope's Dig., § 8843; A.S.A. 1947, § 51-509.

18-42-110. Lien of employer on crop when no written contract.

(a) When no written contract is made under this chapter, the employer shall have a lien upon that portion of the crop going to the employee for any debt incident to making and gathering the crop owing to the employer by the employee without any necessity for recording any contract of writing giving the lien.

(b)(1) In such case, no mortgage or conveyance of any part of the crop made by the person cultivating the land of another shall have validity unless made with the consent of the employer or owner of the land or crop, and the consent must be endorsed upon the mortgage or conveyance.

(2) However, no endorsement shall bind the party making it to pay the debt unless expressly so stipulated.

History. Acts 1883, No. 96, § 9, p. 176; C. & M. Dig., § 6888; Pope's Dig., § 8844; A.S.A. 1947, § 51-510.

Cross References. Lien of landlord on crop, § 18-41-101.

CHAPTER 43

LABORERS' LIENS GENERALLY

SECTION.

- 18-43-101. Lien for production of labor.
- 18-43-102. Lien on object, etc., worked on — Liability of purchasers.
- 18-43-103. Miner's or quarry worker's lien.
- 18-43-104. Time liens take effect.
- 18-43-105. Time to commence actions — Settlement.
- 18-43-106. Filing of sworn statement.
- 18-43-107. Notice of action.
- 18-43-108. Proceedings for larger amounts.

SECTION.

- 18-43-109. Officer to take charge of property.
- 18-43-110. Jury trial.
- 18-43-111. Laborer allowed attorney's fee.
- 18-43-112. Sale of property.
- 18-43-113. Execution on judgment.
- 18-43-114. Pro rata distribution.
- 18-43-115. Real estate not exempt.
- 18-43-116. Land to be sold with buildings.
- 18-43-117. Bill of sale or deed.
- 18-43-118. Lien on crops.

A.C.R.C. Notes. References to "this chapter" in §§ 18-43-101 — 18-43-117 may not apply to § 18-43-118 which was enacted subsequently.

Effective Dates. Acts 1868, No. 64, § 22: effective 30 days after passage.

Acts 1895, No. 23, § 2: effective on passage.

Acts 1895, No. 35, § 3: effective on passage.

RESEARCH REFERENCES

Am. Jur. 27 Am. Jur. 2d, Emp. Rel., § 52.

Ark. L. Notes. Copeland, Recent Arkansas Cases Involving Article Nine of the U.C.C., 1995 Ark. L. Notes 31.

Ark. L. Rev. Creditors' Provisional Remedies and Debtors' Due Process Rights: Statutory Liens in Arkansas, 32 Ark. L. Rev. 185.

Looney, Legal and Economic Considerations in Drafting Arkansas Farm Leases, 35 Ark. L. Rev. 395.

U. Ark. Little Rock L.J. Maltz, State Action and Statutory Liens in Arkansas — A Reply to Professor Nickles, 2 U. Ark. Little Rock L.J. 357.

CASE NOTES

Applicability.

Sections 18-43-101, 18-43-106, 18-43-107, 18-43-109 and 18-43-110 apply only

to movable property. *Dano v. Mississippi, O. & R.R.R.*, 27 Ark. 564 (1872).

18-43-101. Lien for production of labor.

All laborers who shall perform work and labor for any person under a written or verbal contract shall have an absolute lien on the production of their labor for the work and labor if unpaid for it.

History. Acts 1868, No. 64, § 1, p. 176; C. & M. Dig., § 6848; Pope's Dig., § 8804; A.S.A. 1947, § 51-301.

Cross References. Artisan liens, § 18-45-101 et seq.

Contracts for services or labor, §§ 18-42-101, 18-42-102.

Lien of employer on crop when no written contract, § 18-42-110.

Liens of laborers during contract, § 18-42-105.

Mechanics' liens, § 18-44-101 et seq.

Priority of tenant employee's lien, § 18-41-104.

CASE NOTES

ANALYSIS

In General.

Construction.

Assignment.

Entitlement to Lien.

—Crops.

—Logs and Lumber.

Remedies.

Waiver.

In General.

The lien must arise out of contract. *Dano v. Mississippi, O. & R.R.R.*, 27 Ark. 564 (1872).

Construction.

The remedy is summary and should be strictly construed. *Dano v. Mississippi, O. & R.R.R.*, 27 Ark. 564 (1872).

Assignment.

The laborer's lien given by this section is personal and not assignable. *Dano v. Mississippi, O. & R.R.R.*, 27 Ark. 564 (1872).

Entitlement to Lien.

To come within the meaning of this section, the laborer must produce something to which the lien can attach and a laborer on a railroad is not a laborer within the meaning of this section. *Dano v. Mississippi, O. & R.R.R.*, 27 Ark. 564 (1872).

The lien exists only for those whose work contributed directly to the production of the property sought to be charged. *Russell v. Painter*, 50 Ark. 244, 7 S.W. 35 (1888); *Van Etten v. Cook*, 54 Ark. 522, 16 S.W. 477 (1891).

A well digger has no lien under this section for his labor. *Guise v. Oliver*, 51 Ark. 356, 11 S.W. 515 (1889).

Lien claimant must bring himself strictly within this section, and must have performed manual labor, but he is within this section where he uses simple tools that are merely incidental to his labor.

Sain v. R. Abramson Co., 218 Ark. 415, 236 S.W.2d 585 (1951).

This section and § 18-43-102 give lien to person who performs labor and not to person who hires and pays for labor performed. *Sain v. R. Abramson Co.*, 218 Ark. 415, 236 S.W.2d 585 (1951).

—Crops.

One who raises a crop upon the land of another for an agreed share is a laborer and not a tenant, and is entitled to a lien. *Burgie v. Davis*, 34 Ark. 179 (1879).

Hay is the production of the laborer who cuts and rakes the grass, and he has a lien on it for the price or value of his labor. *Emerson v. Hedrick*, 42 Ark. 263 (1883).

A farm overseer is not a laborer within this section. *Flournoy v. Shelton*, 43 Ark. 168 (1884).

A sharecropper has a contingent interest in the crop which he may mortgage. The laborer's lien statute has been construed to give cropper a lien on the crop grown for his labor, which is superior to a mortgage on the crop given by the employer even where the mortgage is prior in point of time. *Houck v. Birmingham*, 217 Ark. 449, 230 S.W.2d 952 (1950).

Plaintiffs who picked defendant's cotton crop with their mechanical picker had right to lien for their own labor in operating picker and hauling crop to gin but had no right to lien for use of picker. *Sain v. R. Abramson Co.*, 218 Ark. 415, 236 S.W.2d 585 (1951).

Where employee's understanding that contract would be completed and he would be entitled to bonus at the end of the "crop year" was corroborated by testimony that the bonus became effective when crops were harvested, he was entitled to a bonus at the time of harvest of crops. *Scroggins v. Bowen*, 249 Ark. 1155, 464 S.W.2d 79 (1971).

—Logs and Lumber.

The superintendent of a shingle mill who occasionally did other work at the

mill; the night watchman, who raised steam in the mornings for the work, and cleaned the machinery; an assistant who removed sawdust, etc., from the mill, were not entitled to liens on the shingles; but the engineer, sawyer, and others who directly assisted were entitled to a lien on the shingles produced by their work. *Russell v. Painter*, 50 Ark. 244, 7 S.W. 35 (1888).

A sawyer at a mill has no lien on lumber made therein, except for the specific lumber produced while his wages were unpaid. *Russell v. Painter*, 50 Ark. 244, 7 S.W. 35 (1888).

A laborer who hauls logs as a subcontractor is entitled to a lien. *Allen v. Roper*, 75 Ark. 104, 86 S.W. 836 (1905).

Seller of logs has no lien for purchase price or cost of hauling. *Stout Lumber Co. v. Green*, 173 Ark. 823, 293 S.W. 709 (1927).

Remedies.

If the product of the labor has been sold, the laborer's remedy is to follow the crop by attachment or to sue in equity to recover the proceeds. *Barrett v. Nichols*, 85 Ark. 58, 107 S.W. 171 (1908).

Where employee is entitled to a specific portion of the sale proceeds of the crop, the remedy at law for damages would not be "adequate" and, since imposing a lien and constructive trust constitutes appropriate remedy in the chancery court, employer's motion to transfer to the circuit court was properly denied. *Scroggins v. Bowen*, 249 Ark. 1155, 464 S.W.2d 79 (1971).

Waiver.

A lien for labor may be waived. *Clark v. Wilson*, 171 Ark. 323, 284 S.W. 23 (1926); *Scroggins v. Bowen*, 249 Ark. 1155, 464 S.W.2d 79 (1971).

18-43-102. Lien on object, etc., worked on — Liability of purchasers.

(a)(1) Laborers who perform work and labor on any object, thing, material, or property shall have an absolute lien on the object, thing, material, or property for labor done and performed, subject to prior liens and landlord's liens for rent and supplies.

(2) These liens may be enforced within the same time and in the same manner provided for by law to enforce laborer's liens on the production of labor done and performed.

(b) When the object, thing, material, or property on which a lien exists as provided for in subsection (a) of this section has been sold, transferred, or disposed of before the lien has been liquidated or released, the purchaser thereof, with notice of the lien, the material, thing, object, or property so sold, transferred, or disposed of shall be liable to the amount of the lien, or so much thereof as may be necessary to liquidate the liens mentioned in subsection (a) of this section.

History. Acts 1895, No. 35, §§ 1, 2, p. 39; C. & M. Dig., §§ 6864, 6865; Pope's Dig., §§ 8820, 8821; A.S.A. 1947, §§ 51-317, 51-318.

Cross References. Effective period of landlord's lien on crops, § 18-41-101.

Enforcement of landlord's lien for advances, § 18-41-103.

CASE NOTES

ANALYSIS

Entitlement to Lien.
Priority.

Entitlement to Lien.

This section gives a lien to laborers whether they are employed by the owner of the object, thing, material or property, or by one who has a contract with the owner to do the work. *Klondike Lumber Co. v. Williams Bros.*, 71 Ark. 334, 75 S.W. 854 (1903).

One who undertakes to cut logs for another and execute his contract partly by his own labor and partly by that of others hired for that purpose, is entitled to a lien only for work actually performed by himself. *Valley Pine Lumber Co. v. Hodgens*, 80 Ark. 516, 97 S.W. 682 (1906).

This section does not create a lien unless the labor forms a part of the act of converting material into a product or unless the hauling is for the purpose of having work done on the article trans-

ported and the hauling forms part of the work to be done. *Ruddell v. Reves*, 146 Ark. 259, 225 S.W. 316 (1920).

This section has been held to give a lien on property for use of wagon and team hauling the property when actually driven by the one who files the claim for labor. *Terry v. Little*, 179 Ark. 954, 18 S.W.2d 916 (1929).

This section and § 18-43-101 give lien to person who performs labor and not to person who hires and pays for labor performed. *Sain v. R. Abramson Co.*, 218 Ark. 415, 236 S.W.2d 585 (1951).

Priority.

This lien is subordinate to prior subsisting liens. *Johnson v. Gillenwater*, 75 Ark. 114, 87 S.W. 439 (1905).

A landowner's right to a lien for advances on a sharecropper's interest in the crop is superior to the lien of the laborers. *Campbell v. Anderson*, 189 Ark. 671, 74 S.W.2d 782 (1934).

18-43-103. Miner's or quarry worker's lien.

(a) Any person working in any mines in the State of Arkansas or in any quarries, either stone or marble, shall have a lien on the output of any such mines or quarries for the amount due for his or her work. In addition thereto, his or her lien shall attach to all the machinery, tools, and implements used in quarrying or mining.

(b) These liens shall be enforced in the manner provided for the enforcement of laborers' liens.

History. Acts 1895, No. 23, § 1, p. 27; C. & M. Dig., § 7293; Pope's Dig., § 9349; A.S.A. 1947, § 51-319.

CASE NOTES

ANALYSIS

Entitlement to Lien.
Jurisdiction.
Priority.

Entitlement to Lien.

Miners employed by lessee were entitled to lien provided by this section where evidence showed that the owner

had control of entire output and that mine was operated for his benefit. *Laser v. State ex rel. McKinley*, 198 Ark. 945, 132 S.W.2d 193 (1939).

Jurisdiction.

A justice of the peace had no jurisdiction to declare a laborer's lien on a mine and on houses and machinery permanently attached to a freehold, therefore, the circuit

court acquired none on appeal. *Hoye Coal Co. v. Colvin*, 83 Ark. 528, 104 S.W. 207 (1907).

Priority.

The lien provided by this section was not superior to the lien of a chattel mort-

gage on the leasehold interest and equipment of a mine existing at the inception of the miner's lien. *Estep v. Blue Ribbon Coal Co.*, 177 Ark. 83, 9 S.W.2d 331 (1928).

18-43-104. Time liens take effect.

Liens under the provisions of §§ 18-43-101, 18-43-105 — 18-43-110, and 18-43-112 — 18-43-117 are in full force and effect from and after the time the labor is performed.

History. Acts 1868, No. 64, § 14, p. 224; C. & M. Dig., § 6859; Pope's Dig., § 8815; A.S.A. 1947, § 51-312.

18-43-105. Time to commence actions — Settlement.

(a) Proceedings under this section and §§ 18-43-101, 18-43-104, 18-43-106 — 18-43-110, and 18-43-112 — 18-43-117 shall be commenced within eight (8) months after the work is done.

(b) However, the employer may bring the laborer to settlement before a proper officer any time after the labor is performed by giving the laborer or his or her agent ten (10) days' notice.

History. Acts 1868, No. 64, § 17, p. 224; C. & M. Dig., § 6862; Pope's Dig., § 8818; A.S.A. 1947, § 51-315.

CASE NOTES

Applicability.

An action to enforce a lien under §§ 18-44-201 — 18-44-210 does not come within this section as liens are creatures of stat-

ute and must be perfected and enforced according to the statutes under which they are created. *Hirsch v. Farris*, 174 Ark. 1040, 298 S.W. 487 (1927).

18-43-106. Filing of sworn statement.

(a)(1) Every person who has a lien as provided in this section and §§ 18-43-101, 18-43-104, 18-43-105, 18-43-107 — 18-43-110, and 18-43-112 — 18-43-117 and wishes to avail himself or herself of the lien shall, if the amount is less than one hundred dollars (\$100), and may, at his or her own discretion, if the amount does not exceed three hundred dollars (\$300), go before any justice of the peace in the county where the lien exists.

(2)(A) The claimant shall make a sworn statement of the amount due after all just credits are given, to the best of his or her knowledge and belief, and state the kind of service, and for whom rendered, materials furnished, etc. The statement shall also contain a list of land, property, crops, or other productions of his or her labor charged.

(B) The truth of the sworn statement may be put in issue as in cases of attachment.

(b) The justice of the peace shall keep the statement on file and shall enter a brief of the case on his or her judgment docket.

History. Acts 1868, No. 64, §§ 5, 7, p. 224; C. & M. Dig., §§ 6849, 6850, 6852; Pope's Dig., §§ 8805, 8806, 8808; A.S.A. 1947, §§ 51-302, 51-304.

Publisher's Notes. As enacted, Acts 1868, No. 64, § 5, contained jurisdictional amounts of two hundred dollars (\$200) for exclusive jurisdiction and five hundred

dollars (\$500) for concurrent jurisdiction. The section has been rewritten to conform to the jurisdictional amounts for justice of the peace courts set forth in Ark. Const., Art. 7, § 40 [repealed].

Cross References. Enforcement of laborer's lien, § 11-4-305.

CASE NOTES

Commencement of Action.

Mere filing of an affidavit and notice of laborer's lien in circuit court pursuant to

this section did not constitute commencement of action. *Scroggins v. Bowen*, 249 Ark. 1155, 464 S.W.2d 79 (1971).

18-43-107. Notice of action.

(a)(1) The justice of the peace shall cause notice to be given to the defendant in the usual way.

(2) However, if the defendant is a nonresident, the notice will be given by at least two (2) insertions in the county newspaper or by posting three (3) notices, two (2) in the most public places in the township where the property is and the other at the county clerk's office, to appear and show cause why judgment shall not be rendered and the property sold.

(b) Notice shall be given at least ten (10) days before the day of trial and must be accompanied by a copy of the sworn statement of the plaintiff.

History. Acts 1868, No. 64, § 6, p. 224; C. & M. Dig., § 6851; Pope's Dig., § 8807; A.S.A. 1947, § 51-303.

CASE NOTES

Jurisdiction.

Where service is had by publication of a warning, jurisdiction is limited to the en-

forcement of the lien. *Smith v. Bank*, 115 Ark. 216, 170 S.W. 1008 (1914).

18-43-108. Proceedings for larger amounts.

When the amount exceeds three hundred dollars (\$300), the proceeding will be the same as described for smaller amounts, except the plaintiff shall make a sworn statement before the clerk of the circuit court, and there shall be thirty (30) days' notice given to the defendant before the day of trial.

History. Acts 1868, No. 64, § 18, p. 224; C. & M. Dig., § 6851; Pope's Dig., § 8807; A.S.A. 1947, § 51-305.

Publisher's Notes. As enacted, Acts 1868, No. 64, § 18, contained the jurisdic-

tional amount of five hundred dollars. The section has been rewritten to conform to the jurisdictional amounts for justice of the peace courts set forth in Ark. Const., Art. 7, § 40 [repealed].

18-43-109. Officer to take charge of property.

At the same time the notice is given to the defendant, the sheriff or constable shall take charge of the property as described in the statement of the plaintiff and hold it subject to the decision of the court, as in cases of attachment.

History. Acts 1868, No. 64, § 8, p. 224; C. & M. Dig., § 6853; Pope's Dig., § 8809; A.S.A. 1947, § 51-306.

18-43-110. Jury trial.

Either plaintiff or defendant may, by requesting the court, have the case tried by a competent jury of six (6) persons.

History. Acts 1868, No. 64, § 9, p. 224; C. & M. Dig., § 6854; Pope's Dig., § 8810; A.S.A. 1947, § 51-307.

18-43-111. Laborer allowed attorney's fee.

When a laborer who has filed a lien for wages gives notice thereof to the debtor or owner of the property, which has been subjected to the lien in writing sent by registered or certified mail, and the claim has not been paid within twenty (20) days from the date of the mailing and the laborer is required to sue for the enforcement of his or her claim for wages, the court shall allow the laborer a reasonable attorney's fee in addition to other relief to which he or she may be entitled.

History. Acts 1961, No. 240, § 1; A.S.A. 1947, § 51-639.

18-43-112. Sale of property.

If the amount adjudged to be due is not paid, with the cost of suit, on the day of trial, then the sheriff or constable shall immediately advertise the property charged for sale at public auction and sell it in not less than fifteen (15) days nor more than twenty-five (25) days from the date the judgment is rendered.

History. Acts 1868, No. 64, § 10, p. 224; C. & M. Dig., § 6855; Pope's Dig., § 8811; A.S.A. 1947, § 51-308.

A.C.R.C. Notes. Acts 1868, No. 64, § 10, provided, in part, that when any real estate was to be sold under a lien for labor, the justice of the peace should im-

mediately file a copy of the judgment rendered in the county clerk's office, the county clerk should place the judgment in his judgment docket, and cause the sheriff to sell the real estate after having given thirty days' notice of the sale. This provision has been superseded by Ark. Const.,

Art. 7, § 40 [repealed] which provides jurisdiction in proceedings involving a lien that a justice of the peace shall not have upon land.

18-43-113. Execution on judgment.

In all cases in which the property charged does not sell for enough to satisfy the judgment rendered, with all costs of suit, in favor of the claimant, execution may issue upon the judgment in the same manner as an ordinary judgment at law against any other property of the defendant.

History. Acts 1868, No. 64, § 11, p. 224; C. & M. Dig., § 6856; Pope's Dig., § 8812; A.S.A. 1947, § 51-309.

18-43-114. Pro rata distribution.

(a) When there are several liens for labor on the same land, crop, or property of the same date, or which are equally just, and not enough to satisfy all claims, the sale will be made, the costs paid, and the money divided pro rata among the several claimants.

(b) The courts shall make the pro rata division as provided for in subsection (a) of this section and shall make the proper credits on the execution.

History. Acts 1868, No. 64, §§ 12, 13, p. 224; C. & M. Dig., §§ 6857, 6858; Pope's Dig., §§ 8813, 8814; A.S.A. 1947, §§ 51-310, 51-311.

18-43-115. Real estate not exempt.

No real estate shall be exempt from sale under an execution on a laborer's lien.

History. Acts 1868, No. 64, § 20, p. 224; C. & M. Dig., § 6863; Pope's Dig., § 8819; A.S.A. 1947, § 51-316.

18-43-116. Land to be sold with buildings.

In selling buildings under the provisions of this section and §§ 18-43-101, 18-43-104 — 18-43-110, 18-43-112 — 18-43-115, and 18-43-117, a reasonable amount of land will be sold with them, not to exceed two (2) acres, surrounding the building.

History. Acts 1868, No. 64, § 15, p. 224; C. & M. Dig., § 6860; Pope's Dig., § 8816; A.S.A. 1947, § 51-313.

18-43-117. Bill of sale or deed.

The officers making any sale as provided in this chapter shall make out the necessary bill of sale or deed.

History. Acts 1868, No. 64, § 16, p. 224; C. & M. Dig., § 6861; Pope's Dig., § 8817; A.S.A. 1947, § 51-314.

18-43-118. Lien on crops.

(a) Every person who harvests agricultural crops belonging to another shall be entitled to a lien against those crops for payment of the cost of harvesting.

(b) Every person who sprays fertilizer, pesticides, or herbicides as a custom applicator on the agricultural crops or lands belonging to another shall be entitled to a lien for the payment of the custom application, and that lien shall be against those crops sprayed or the crops next harvested after the land is sprayed.

(c) The lien provided for in this section shall be filed in the manner prescribed for materialmen's liens under § 18-44-117.

History. Acts 1995, No. 1273, § 1.
A.C.R.C. Notes. References to "this chapter" in §§ 18-43-101 — 18-43-117

may not apply to this section which was enacted subsequently.

CHAPTER 44

MECHANICS' AND MATERIALMEN'S LIENS

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. WELLS, MINES, AND QUARRIES GENERALLY.
3. WELLS, MINES, AND QUARRIES — TRUCKING AND TEAMING CONTRACTORS.
4. RAILROADS.
5. BONDS.

RESEARCH REFERENCES

ALR. Vacation and sick pay and other fringe benefits as within mechanic's lien statute. 20 A.L.R.4th 1268.

Subcontractor's subcontractor or materialman's materialman: Right to lien. 24 A.L.R.4th 963.

Mortgagee-lender's duty, in disbursing funds, to protect mortgagor against outstanding or potential mechanics' liens against the mortgaged property. 30 A.L.R.4th 134.

Delivery of material to building site as sustaining mechanic's lien. 32 A.L.R.4th 1130.

Purchaser of real estate: Liability on mechanic's lien based on goods or labor supplied to vendor but filed after title passed. 33 A.L.R.4th 1017.

Am. Jur. 53 Am. Jur. 2d, Mech. L., § 1 et seq.

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Equity — Rights of a Mistaken Improver, 24 Ark. L. Rev. 133.

Mortgage Provisions Extending the Lien to Future Advances and Antecedent Indebtedness, 26 Ark. L. Rev. 423.

Mechanic's Liens on Projects Financed by Act 9, 28 Ark. L. Rev. 280.

Creditors' Provisional Remedies and Debtors' Due Process Rights: Attachment and Garnishment in Arkansas, 31 Ark. L. Rev. 607.

Creditors' Provisional Remedies and Debtors' Due Process Rights: Statutory Liens in Arkansas, 32 Ark. L. Rev. 185.

Note, *BB & B Construction Company v. F.D.I.C. — Mechanics' and Materialmen's Liens in Arkansas: Priority as a Function of Removability*, 48 Ark. L. Rev. 783.

Josh Rohe, Comment: *A Primer on Arkansas Construction Lien Laws and a Call for Action to Better Protect Homeowners*, 64 Ark. L. Rev. 433 (2011).

C.J.S. 56 C.J.S., Mech. L., § 2 et seq.

U. Ark. Little Rock L.J. Maltz, State

Action and Statutory Liens in Arkansas — A Reply to Professor Nickles, 2 U. Ark. Little Rock L.J. 357.

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CASE NOTES

Cited: *Dempsey v. Merchants Nat'l Bank*, 292 Ark. 207, 729 S.W.2d 150 (1987).

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 18-44-101. Liens on buildings, land, or boats.
- 18-44-102. Entire land subject to lien.
- 18-44-103. Improvements on leased land.
- 18-44-104. Liens for drain pipe or tile.
- 18-44-105. Lien of architect, engineer, surveyor, appraiser, landscaper, abstractor, or title insurance agent.
- 18-44-106. "Owner" defined.
- 18-44-107. Subcontractors — Definitions.
- 18-44-108. Refusal to list parties doing work or furnishing materials.
- 18-44-109. Unlawful to use materials other than as designated.
- 18-44-110. Preference over prior liens — Exception.
- 18-44-111, 18-44-112. [Repealed.]
- 18-44-113. Assignment of liens.
- 18-44-114. Notice and service generally.
- 18-44-115. Notice to owner by contractor — Definitions.

SECTION.

- 18-44-116. Service on nonresident or absconder.
- 18-44-117. Filing of lien.
- 18-44-118. Filing of bond in contest of lien.
- 18-44-119. Limitation of actions.
- 18-44-120, 18-44-121. [Repealed.]
- 18-44-122. Contents of complaint.
- 18-44-123. Parties to suits.
- 18-44-124. Contractor to defend actions on liens by third persons — Liability.
- 18-44-125. Court orders.
- 18-44-126. Warning order for nonresident or absconding owners.
- 18-44-127. Trial and judgment.
- 18-44-128. Attorney's fee.
- 18-44-129, 18-44-130. [Repealed.]
- 18-44-131. Duty to enter satisfaction.
- 18-44-132. Penalty for failure to discharge lien after payment.
- 18-44-133, 18-44-134. [Repealed.]
- 18-44-135. Jointly owned property.

Preambles. Acts 1969, No. 112 contained a preamble which read: "Whereas, recent court decisions have disclosed that certain contractors performing clearing, excavating, or ditching services in the process of constructing home sites were not heretofore granted the same lien as mechanics, materialmen, builders, and la-

borers; and

"Whereas, the contractors performing these vital and indispensable services should receive the same protection as others herein named;

"Now, therefore...."

Effective Dates. Acts 1895, No. 146, § 26: effective on passage.

Acts 1899, No. 182, § 2: effective on passage.

Acts 1913, No. 253, § 3: effective on passage.

Acts 1923, No. 563, § 2: approved Mar. 22, 1923. Emergency clause provided: "That this act being necessary for the public peace, health and safety, an emergency is hereby declared and this act shall take effect and be in force from and after its passage."

Acts 1945, No. 55, § 3: Feb. 16, 1945. Emergency clause provided: "All laws and parts of laws in conflict herewith are hereby repealed, and because of the confusion and uncertainty existing in the various counties throughout the State under the present laws relative to the legal fees entitled to be charged by the Circuit and Chancery Clerks and Recorders in this State for the services they render, an emergency is hereby declared to exist and this act shall take effect and be in force from and after its passage and approval."

Acts 1963, No. 66, § 3: Feb. 15, 1963. Emergency clause provided: "It is hereby found and determined that by reason of the uncertain condition of the law relating to mechanic's and materialman's liens and the lack of proper penalties, owners of property in many instances are being defrauded of funds paid to contractors who fail to discharge existing liens upon the property, and other owners are being subjected to unjust claims of liens, and by reason of such facts an emergency exists affecting the public peace, health, and safety, and this act shall therefore be in full force and effect from and after its passage and approval by the governor."

Acts 1963, No. 124, § 2: Feb. 28, 1963. Emergency clause provided: "It is hereby found and determined by the General Assembly that the fee presently provided for recorders for recording, indexing and cross-indexing instruments of writing is not adequate to compensate such recorders and in fact is working a severe hardship on the recorders in the various counties and that this act is immediately necessary to correct the situation. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in effect from the date of its passage and approval."

Acts 1969, No. 112, § 2: Feb. 25, 1969. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that the contractors performing these invaluable services are in need of the immediate protection which would be granted them under this Act, and that this Act is immediately necessary to extend the same degree of protection to all contractors for performance of their services. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the preservation of the public health, safety, and peace shall be in full force and effect from and after its passage and approval."

Acts 1977, No. 333, § 6: Mar. 1, 1977. Emergency clause provided: "It is hereby found and determined by the General Assembly that the establishment of uniform advance fees to be charged for causes of action by the clerks in the various circuit and chancery courts of this State is necessary to provide for the efficient operation of said offices and to minimize the necessity of maintaining separate accounts for various fees; that the fees charged by county recorders are not now adequate to reimburse the county for the service of recording instruments, and that the immediate passage of this Act is necessary to promote the efficient administration of justice in this State and to enable counties to recover reasonable fees for services rendered by recorders. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1979, No. 746, § 7: Oct. 1, 1979.

Acts 1983, No. 304, § 3: Mar. 2, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that contractors licensed under the Contractors' Licensing Law should not be required to comply with the notice provisions of Act 746 of 1979 to the extent of commercial and industrial construction; and that this Act is immediately necessary to exempt such persons from the provisions of Act 746. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

Ark. L. Notes. Longino, The Treatment of a Residential Mechanic's Lien Under the Provisions of the Bankruptcy Code: When do the Walls Come Tumbling Down?, 2002 Arkansas L. Notes 113.

Ark. L. Rev. Josh Rohe, Comment: A Primer on Arkansas Construction Lien Laws and a Call for Action to Better Protect Homeowners, 64 Ark. L. Rev. 433 (2011).

CASE NOTES

ANALYSIS

Constitutionality.
Construction.
Applicability.
Compliance.
Prior Acts Repealed.

Constitutionality.

The Arkansas mechanic's and materialman's lien provisions, § 18-44-101 et seq. reached a constitutional accommodation of the respective interests of creditors, debtors and the public and the property interests affected were not such that minimum due process standards required more than the statutes afforded in the way of notice and hearing; accordingly, such statutes did not violate Ark. Const., Art. 2, § 8. *South Cent. Dist. of Pentecostal Church of God of Am., Inc. v. Bruce-Rogers Co.*, 269 Ark. 130, 599 S.W.2d 702 (1980); *Bruce-Rogers Supply Co. v. Petty Plumbing, Inc.*, 270 Ark. 63, 603 S.W.2d 445 (1980).

The Arkansas statutes authorizing the filing and enforcement of mechanics' and materialmen's liens do not allow the taking of a substantial property interest to an extent sufficient to render the statutes unconstitutional as violative of due process of law. *Paragould Paint & Glass, Inc. v. Rodgers*, 269 Ark. 191, 599 S.W.2d 709 (1980).

Construction.

The materialmen's lien law is in derogation of the common law and must be strictly construed. *Scott v. Le Grande*, 225 Ark. 1022, 287 S.W.2d 456 (1956).

Applicability.

One must be in privity of contract with a subcontractor or contractor to avail himself of a mechanic's lien; therefore, the supplier of a materialman is outside this subchapter. *Valley Metal Works, Inc. v. A.O. Smith-Inland, Inc.*, 264 Ark. 341, 572 S.W.2d 138 (1978).

Compliance.

Liens of mechanics and materialmen for work done or materials furnished in the construction of an improvement are creatures of the statute creating them and must be perfected and enforced according to its provisions. *Royal Theater Co. v. Collins*, 102 Ark. 539, 144 S.W. 919 (1912); *Doke v. Benton County Lumber Co.*, 114 Ark. 1, 169 S.W. 327 (1914); *Young Men's Bldg. Ass'n v. Ware*, 158 Ark. 137, 249 S.W. 545 (1923).

There must be a substantial compliance with the statutes regarding the filing of mechanics' and materialmen's liens unless the owner has, by contract or waiver, or in some manner by his conduct, estopped himself from insisting upon such compliance. *Conway Lumber Co. v. Hardin*, 119 Ark. 43, 177 S.W. 408 (1915).

Prior Acts Repealed.

This subchapter covers the whole subject of mechanics' and materialmen's liens and repealed prior acts on the subject. *Barton v. Grand Lodge*, 71 Ark. 35, 70 S.W. 305 (1902), overruled on other grounds, *Long v. Charles T. Abeles & Co.*, 77 Ark. 156, 93 S.W. 67 (1905).

Cited: *Arkholia Sand & Gravel Co. v. Hutchinson*, 291 Ark. 570, 726 S.W.2d 674 (1987).

18-44-101. Liens on buildings, land, or boats.

(a) Every contractor, subcontractor, or material supplier as defined in § 18-44-107 who supplies labor, services, material, fixtures, engines,

boilers, or machinery in the construction or repair of an improvement to real estate, or any boat or vessel of any kind, by virtue of a contract with the owner, proprietor, contractor, or subcontractor, or agent thereof, upon complying with the provisions of this subchapter, shall have, to secure payment, a lien upon the improvement and on up to one (1) acre of land upon which the improvement is situated, or to the extent of any number of acres of land upon which work has been done or improvements erected or repaired.

(b) If the improvement is to any boat or vessel, then the lien shall be upon the boat or vessel to secure the payment for labor done or materials, fixtures, engines, boilers, or machinery furnished.

History. Acts 1895, No. 146, § 1, p. 217; C. & M. Dig., § 6906; Acts 1923, No. 563, § 1; Pope's Dig., § 8865; Acts 1969, No. 112, § 1; A.S.A. 1947, § 51-601; Acts 1995, No. 1298, § 1.

Cross References. Laborers' liens,

§ 18-43-101 et seq.

Liens of artisans and repairmen, § 18-45-101 et seq.

Liens of employers and employees under contract, § 18-42-101.

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Recent Developments: Contracts — Forum Selection Clause, 57 Ark. L. Rev. 215 (2004).

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CASE NOTES

ANALYSIS

Constitutionality.
Construction.
Bankruptcy.
Burden of Proof.
Contract.
—Agents.
—Lessees.
—Owners.
Entitlement to Lien.
Legislative Intent.
Materials Furnished.
Mortgages.
Preparatory Work.
Priority.
Scope of Lien.
—Multiple Projects.
Work or Labor Done.

Constitutionality.

Criminal provision formerly contained in this section violated Ark. Const., Art. 2, § 16 prohibiting imprisonment for debt in the absence of fraud. *Peairs v. State*, 227 Ark. 230, 297 S.W.2d 775 (1957).

Construction.

This section is to be strictly construed because it is an extraordinary remedy not available to every merchant or worker. *Christy v. Nabholz Supply Co.*, 261 Ark. 127, 546 S.W.2d 425 (1977); *Valley Metal Works, Inc. v. A.O. Smith-Inland, Inc.*, 264 Ark. 341, 572 S.W.2d 138 (1978); *Ragsdell v. Gazaway Lumber Co.*, 11 Ark. App. 188, 668 S.W.2d 60 (1984).

The 1969 amendment to subsection (a) of this section made improvements to land

lienable. *BB & B Constr. Co. v. FDIC*, 316 Ark. 663, 875 S.W.2d 48 (1994).

Although this section provides which materialman shall receive protection by a land improvement lien as well as the nature and the extent of the lien, § 18-44-110 still sets forth the priority of these liens to other encumbrances and the nature of the lien's attachment. *BB & B Constr. Co. v. FDIC*, 316 Ark. 663, 875 S.W.2d 48 (1994).

In Arkansas, a materialman's lien arises by statute on the date construction begins; it remains inchoate until it is perfected (or expires by failure to timely perfect); and upon perfection, it relates back to the date construction began. *Betty's Homes, Inc. v. Cooper Homes, Inc.*, 411 B.R. 626 (W.D. Ark. 2009).

Bankruptcy.

Where claimants in bankruptcy furnished labor and material to bankrupt prior to filing date of bankruptcy, and mechanics' liens were recorded by the claimants prior to such date, such liens were perfected prior to date of bankruptcy and were allowable claims. In *re Taylor Oak Flooring Co.*, 87 F. Supp. 6 (W.D. Ark. 1949).

Burden of Proof.

Property owner asserting defense of estoppel to suit to foreclose lien has the burden of proof to establish defense. *Kenmore v. Robbins*, 223 Ark. 384, 266 S.W.2d 64 (1954).

In a suit for a materialman's lien, where the defendant claims an estoppel the burden of proving estoppel is on the person asserting it by a preponderance of the evidence. *Orrell v. E.C. Barton & Co.*, 240 Ark. 211, 398 S.W.2d 685 (1966).

The findings of the trial court that the plaintiff had failed to establish that the materials in question were allegedly delivered and incorporated in the house was not against the preponderance of the evidence. *Stone Mill & Lumber Co. v. Finsterwalder*, 249 Ark. 363, 459 S.W.2d 117 (1970).

The burden is on the materialman to show that the materials for which he claims a lien were used in the improvements on which the lien is sought. *Ragsdell v. Gazaway Lumber Co.*, 11 Ark. App. 188, 668 S.W.2d 60 (1984).

The requirement of this section was met where plaintiff had a contract with an

agent of the contractor. *Seyller v. Pierce & Co.*, 306 Ark. 474, 816 S.W.2d 577 (1991).

Where a trial court heard the testimony of two conflicting expert opinions and it decided that both experts were credible, it did not err when it placed the burden of proof upon contractors to show that their improvements increased the value of a property that had gone into foreclosure. *Del Mack Constr., Inc. v. Owens*, 82 Ark. App. 415, 118 S.W.3d 581 (2003).

Consistent rule has been to place the burden on the supplier to show that the materials for which he claims a lien were used in the improvement on which a lien was sought because the lien does not attach until the materials supplied are actually used and incorporated into the improvement; if the rule were otherwise, it would render meaningless the provision of § 18-44-110(b)(1) that the materialmen's lien extends only to the enhancement of the value of the improvement for which the materials were used. *Del Mack Constr., Inc. v. Owens*, 82 Ark. App. 415, 118 S.W.3d 581 (2003).

Contract.

There can be no materialman's or laborer's lien upon an improvement for material furnished and work done upon a contract with an administrator made after the death of the intestate. *Doke v. Benton County Lumber Co.*, 114 Ark. 1, 169 S.W. 327 (1914).

A principal contractor can make no contract with the owner of land which would defeat the lien of subcontractors, laborers, and materialmen. *Home Oil Co. v. Helton*, 179 Ark. 132, 14 S.W.2d 549 (1929).

A materialman's lien is not effective against the land, unless a contract is made with the owner or his agent. *Daly v. Arkadelphia Milling Co.*, 126 Ark. 405, 189 S.W. 1053 (1916); *Morehart v. A.B. Beeler Lumber Co.*, 176 Ark. 818, 4 S.W.2d 29 (1928); *Hawkins v. Faubel*, 182 Ark. 304, 31 S.W.2d 401 (1930).

Circuit court erred in foreclosing a materialmen's lien because the lienor did not have a valid lien; while it orally contracted with a party it thought had an ownership interest in the property, it did not enter into a contract either with the owner of the property or with a person or entity that had an interest in the property at the time it supplied materials. *Florida Oil Investment Group, LLC v. Goodwin &*

Goodwin, Inc., 2015 Ark. App. 209, 463 S.W.3d 323 (2015).

—Agents.

Where the contract is made with an agent, in order to bind the principal, it is essential that the agent have authority to make such a contract; the burden of proof is upon the parties attempting to assert the lien to show that the person with whom they contracted was the agent of the owner and that as agent, he acted within the scope of his authority when he authorized the work to be done. *Daly v. Arkadelphia Milling Co.*, 126 Ark. 405, 189 S.W. 1053 (1916).

One who sells material to a husband to be used in improving the wife's property is not entitled to a lien therefor in the absence of proof that the husband had authority to act as agent of the wife. *Morehart v. A.B. Beeler Lumber Co.*, 176 Ark. 818, 4 S.W.2d 29 (1928).

Materialmen's lien can be created if a contract is shown to exist between a materialman and a contractor representing the owner, and the necessary contract can be by express agreement or implied from the circumstances or conduct of the parties. *Gillison Dist. Bldg. Materials, Inc. v. Talbot*, 253 Ark. 696, 488 S.W.2d 317 (1972).

Evidence did not show agency relationship between the purchaser-contractor who made improvements before acquiring title and the owner sufficient to imply a contract on the part of the owner to pay for the improvements or the materials. *Young v. Mobley Constr. Co.*, 266 Ark. 935, 587 S.W.2d 837 (Ct. App. 1979).

—Lessees.

Where a lease authorized the lessee to make certain improvements which were to be paid for by deducting the cost of the same from the rent, one who furnishes materials to the lessee to make the improvements will be entitled to a lien on the property for the amount thereof. *Whitcomb v. Gans*, 90 Ark. 469, 119 S.W. 676 (1909).

One who does work on certain leased premises at the request of the lessee cannot enforce a mechanic's lien against the property where there was no agreement between the lessee and the owner that the latter should pay for the repairs. *Langston v. Matthews*, 117 Ark. 626, 173 S.W. 397 (1915).

—Owners.

Where material was furnished to a purchaser of real property to make improvements on land, the deed to which was placed in escrow till the purchase money was paid, and if not paid, the deed to be returned, there was no such title in the purchaser as would enable the materialmen to secure a lien unless the purchase money were paid. *Mansfield Lumber Co. v. Gravette*, 177 Ark. 31, 5 S.W.2d 726 (1928).

Materials furnished to construct warehouse on land owned by third party do not subject land to a lien where there was no showing they were furnished pursuant to a contract with the landowner and the evidence created no elements of estoppel against owner's paramount rights over the lienors. *Arkansas Foundry Co. v. Farrell*, 238 Ark. 757, 385 S.W.2d 26 (1964).

Although record was void of any evidence of a contract between sellers of building materials and home owners, the evidence was sufficient as to the individual's contractor status and a contract between him and the sellers to establish a prima facie case as to asserted materialmen's liens. *Gillison Dist. Bldg. Materials, Inc. v. Talbot*, 253 Ark. 696, 488 S.W.2d 317 (1972).

Where owners of house had no knowledge of secret agreement between materialman and contractor to apply payments to past-due accounts and did not have the opportunity to protect their interests, the materialman was estopped from enforcing his lien against the property. *Howard Bldg. Centre v. Thornton*, 282 Ark. 1, 665 S.W.2d 870 (1984).

Entitlement to Lien.

Property owner was entitled to prevail in suit by painter to foreclose lien where there was substantial evidence that painter agreed with property owner that the owner could pay full amount of contract price to contractor. *Kennemore v. Robbins*, 223 Ark. 384, 266 S.W.2d 64 (1954).

One who contracted with the owner of a building to install air conditioning in a restaurant therein leased to a third party was entitled to a lien for his labor and material when the restaurant was destroyed by fire before completion of the installation and never rebuilt. *Bell v. Carver*, 245 Ark. 31, 431 S.W.2d 452 (1968).

The utility contractor was awarded a materialman's lien against the owner's real property for the amount of contractor's judgment where the repairs made by the contractor inured to the benefit of the owner by improving its property. *Howell v. Worth James Constr. Co.*, 259 Ark. 627, 535 S.W.2d 826 (1976).

Where unpaid materialman did not have a fixed-sum contract for any part of the job, supplied materials to the job, and from time to time sent its laborers to the job to perform construction work but the laborers did not assign their rights to a lien, the materialman was not entitled to a lien for labor. *Christy v. Nabholz Supply Co.*, 261 Ark. 127, 546 S.W.2d 425 (1977).

Subcontractors, as materialmen, had a statutory right to seek judgment on their liens previously filed pursuant to Arkansas law and foreclosure on the general contractor's real property located in Arkansas; subsection (a) gave the subcontractors an absolute right to file such a lien and the choice-of-law provision in the contracts was meaningless because, as to real property located within Arkansas, this statute controlled over the forum-selection clause in the contract. *RMP Rentals v. Metroplex, Inc.*, 356 Ark. 76, 146 S.W.3d 861 (2004).

Subcontractor did not acquire a mechanic's and materialman's lien on a home because neither the subcontractor nor the contractor gave the homeowner the notice required by § 18-44-115, notwithstanding that the subcontractor provided the notice required by § 18-44-114(a). *Bryant v. Jim Atkinson Tile*, 100 Ark. App. 408, 269 S.W.3d 383 (2007).

Legislative Intent.

Review of the foreword to Acts 1969, No. 112 (which amended this section), shows that the legislature's purpose in changing the wording in subsection (a) to "to or upon" was to include certain contractors under the umbrella of creditor protection; there is no suggestion in this language that the legislature, by making this change, intended, in the absence of removable improvements, to give materialmen priority over all liens. *BB & B Constr. Co. v. FDIC*, 316 Ark. 663, 875 S.W.2d 48 (1994).

The legislature, by stating "improvements upon land" rather than "improvement to land" did not intend a lien to

attach to the land so improved, but confined the lien to the land "upon which the same are situated." *BB & B Constr. Co. v. FDIC*, 316 Ark. 663, 875 S.W.2d 48 (1994).

Materials Furnished.

To entitle the materialman to a lien under this section, the material or machinery furnished must as a rule be attached to or become a part of the improvement or building upon land, or must be used in making such improvement. *Meek v. Parker*, 63 Ark. 367, 38 S.W. 900 (1897).

Where materials are delivered at or near where the building is to be erected and the building is actually completed of materials like those furnished, this is prima facie evidence that the materials were used in its construction and the burden is on the owner to show that they were not so used. *Central Lumber Co. v. Braddock Land & Granite Co.*, 84 Ark. 560, 105 S.W. 583 (1907); *Half Moon Gin Co. v. E. C. Ribinson Lumber Co.*, 207 Ark. 483, 181 S.W.2d 239 (1944).

Under this section, materials furnished for a building must be actually used in it before a lien will be acquired. *Central Lumber Co. v. Braddock Land & Granite Co.*, 84 Ark. 560, 105 S.W. 583 (1907); *Half Moon Gin Co. v. E. C. Ribinson Lumber Co.*, 207 Ark. 483, 181 S.W.2d 239 (1944).

In view of § 18-44-109, there is a presumption that materials furnished to a contractor are furnished on the credit of the building. *Pratt v. Nakdimen*, 99 Ark. 293, 138 S.W. 974 (1911).

Electric lighting fixtures installed in a building to be used as a motion picture theater were included within the section giving a person a lien upon a building for materials furnished in its construction. *O'Neill v. Lyric Amusement Co.*, 119 Ark. 454, 178 S.W. 406 (1915).

Oil tanks and fixtures furnished on a mining lease were within this section. *American Tank Co. v. Continental & Commercial Trust & Sav. Bank*, 3 F.2d 122 (8th Cir. 1924).

Materialman can recover for the retail value of material furnished including profits. *John E. Bryant & Sons Lumber Co. v. Moore*, 264 Ark. 666, 573 S.W.2d 632 (1978).

Mortgages.

Mortgage filed after work commences will be subordinate to any liens based on

the commenced work. *Dempsey v. Merchants Nat'l Bank*, 292 Ark. 207, 729 S.W.2d 150 (1987).

Preparatory Work.

A contractor's lien does not attach until the commencement of work and inspecting and measuring the premises and driving a peg to locate the center of the house was not such a commencement of the work. *Mark's Sheet Metal, Inc. v. Republic Mtg. Co.*, 242 Ark. 475, 414 S.W.2d 106 (1967).

Preparatory work, such as grading, removal of debris, and demolition of old structures, which is not visible notice that a building is to be erected does not constitute commencement of work so as to give the lien for such work priority over a subsequently recorded construction mortgage. *Clark v. GE Co.*, 243 Ark. 399, 420 S.W.2d 830 (1967).

This section does not give a right of lien to one performing the services of surveyor or civil engineer preparatory to contemplated improvements. *John E. Mahaffey & Assocs. v. Brophy*, 249 Ark. 884, 462 S.W.2d 226 (1971).

Priority.

The claims of a contractor are subordinated to the claims of laborers and materialmen. *Long v. Charles T. Abeles & Co.*, 77 Ark. 156, 93 S.W. 67 (1905).

Where, prior to the recording of a construction money mortgage, a materialman furnished materials for construction of home, the mortgagee, by paying first materialman, did not defeat the priority of liens of materialmen who furnished materials after the recording of the mortgage, as their liens related back to commencement of construction of the home and were on an equality with that of the first materialman. *Planters Lumber Co. v. Jack Collier E. Co.*, 234 Ark. 1091, 356 S.W.2d 631 (1962).

A construction mortgage had priority over a subsequent materialmen's lien as to proceeds of the mortgage advanced for labor and materials, but not as to money retained by the mortgagee for the purchase price of the ground nor as to money paid by the disbursing agent to the mortgagee for interest. *Planters Lumber Co. v. Wilson Co.*, 241 Ark. 1005, 413 S.W.2d 55 (1967).

Where there was no actual, legal, or constructive notice that bank had a mort-

gage on land when work commenced, materialmen had a right to rely on record and materialmen's lien had priority over mortgage. Lien on new construction by materialman related back to the time when work commenced and took priority over any claims perfected after that time. *Dempsey v. Merchants Nat'l Bank*, 292 Ark. 207, 729 S.W.2d 150 (1987).

Despite the 1969 amendment to subsection (a) of this section, the law remains that as between the lien of a mechanic or the furnisher of material and the lien of a prior mortgage, the lien of the former is superior only upon a separate building constructed on the land with the labor and material furnished, or to such an addition as is separable from the original building; as between a materialman and a prior mortgagor, "first-in-time, first in right" is the law in Arkansas unless the materialman can remove the improvements from the land. *BB & B Constr. Co. v. FDIC*, 316 Ark. 663, 875 S.W.2d 48 (1994).

Scope of Lien.

A materialman who has furnished materials for building a sidewalk has a lien therefor upon the sidewalk and the abutting lots. *Leiper & Mills v. Minnig*, 74 Ark. 510, 86 S.W. 407 (1905).

One who, under contract with the owner of a lot, connected a building thereon with the water main by laying a pipe across the property of adjoining proprietors with their consent was entitled to a mechanic's lien for the entire pipe and the lien could be enforced against one who subsequently purchased the lot from such owner. *Speer Hdwe. Co. v. Bruce Bros.*, 105 Ark. 146, 150 S.W. 403 (1912).

A contractor's lien is limited to materials furnished or labor actually performed by him; he has no lien for profits. *Cook v. Moore*, 152 Ark. 590, 239 S.W. 750 (1922); *Withrow v. Wright*, 215 Ark. 654, 222 S.W.2d 809 (1949).

One who claimed a lien against a purchaser of land for materials furnished to build a garage had no lien on the land after the vendor had retaken the property upon the purchaser's default. *Judd v. Rieff*, 174 Ark. 362, 295 S.W. 370 (1927).

Property to which a sewer line is accessible though not an appurtenance is not subject to a lien for pipe furnished in the construction of the sewer line. *Cabot Indus. Dev. Corp. v. Shearman Concrete*

Pipe Co., 239 Ark. 93, 387 S.W.2d 336 (1965).

One who furnished asphalt and labor for the pavement of streets and roadways in a subdivision, under contract with the subdivider, was not entitled to a lien on the entire subdivision and it was encumbered upon him to show by evidence the location of the roadways and streets upon which he supplied labor and materials and what lots abutted upon them. *Dix v. Olds*, 242 Ark. 850, 415 S.W.2d 567 (1967).

Materialmen's liens attached only to the land and improvements and did not attach to the unexpended proceeds of a construction mortgage, securing future advances, still unadvanced by the mortgage. *House v. Scott*, 244 Ark. 1075, 429 S.W.2d 108 (1968).

Where the contract or purchase of materials was made by previous owners and the suit was a suit in rem against the property, the only recovery that could be made by the plaintiff was under this section which grants a lien against the property for materials and labor furnished; because this section does not provide that the supplier of the materials or labor has a lien for attorney's fees, attorney's fees were not recoverable. *Transportation Properties, Inc. v. Central Glass & Mirror of N.W. Ark., Inc.*, 38 Ark. App. 60, 827 S.W.2d 667 (1992).

Lien provided by this section did not extend to profits on a cost-plus contract, but only to the costs of labor and material, and where the trial court improperly allowed the construction company the full amount of its claim, which included the builder's fee, without segregating the builder's fee or any profits, that portion of the trial court's judgment was reversed. *Hickman v. Kralicek Realty & Constr. Co.*, 84 Ark. App. 61, 129 S.W.3d 317 (2003).

Entire value of a materialman's lien for steel was properly found to attach to four barges; the barge builder failed to rebut the presumption that the barges incorporated the supplier's steel. An argument that the presumption did not apply because the steel was not solely furnished for the barge project failed because substantial evidence indicated that the supplier understood that the steel was to be used to build the barges. *Falcon Steel, Inc. v. J. Russell Flowers, Inc.*, 635 F.3d 369 (8th Cir. 2011).

—Multiple Projects.

Work done and materials furnished for the improvement of two separate tracts of land will not create a lien on both tracts unless the work was done and materials furnished under entire contract. *Meek v. Parker*, 63 Ark. 367, 38 S.W. 900 (1897).

Where materials were furnished and labor performed for the construction of several buildings, each building will be liable only for the materials furnished and labor done in its construction, unless the buildings were upon the same lot or upon contiguous lots and the contract for labor and materials was entire, in which case all such lots would be jointly liable. *Central Lumber Co. v. Braddock Land & Granite Co.*, 84 Ark. 560, 105 S.W. 583 (1907).

A lien exists in favor of a materialman upon two or more lots where the materials are furnished under a single contract for buildings to be constructed upon two or more lots which are not contiguous. *Burel v. East Ark. Lumber Co.*, 129 Ark. 58, 195 S.W. 378 (1917).

Work or Labor Done.

To qualify as a laborer or mechanic, a person must perform manual labor either with his hands or with tools. Drawings which require skill are not the type of services contemplated by a laborer's lien. *Westside Galvanizing Servs., Inc. v. Georgia-Pacific Corp.*, 724 F. Supp. 644 (W.D. Ark. 1989), *aff'd*, 921 F.2d 735 (8th Cir. 1990).

Physical presence on a job site without more does not fall within the definition of "work or labor done." *Buckman v. Gay*, 27 Ark. App. 184, 768 S.W.2d 547 (1989).

Cited: *Rea v. Lammers*, 212 Ark. 792, 207 S.W.2d 740 (1948); *Wood v. Hummel*, 217 Ark. 617, 232 S.W.2d 454 (1950); *Crump & Rodgers Co. v. Southern Implement Co.*, 229 Ark. 285, 316 S.W.2d 121 (1958); *Burks v. Sims*, 230 Ark. 170, 321 S.W.2d 767 (1959); *Scott v. Vuurens*, 236 Ark. 731, 368 S.W.2d 80 (1963); *State v. Jacks*, 243 Ark. 77, 418 S.W.2d 622 (1967); *Bobo v. Sebree*, 244 Ark. 915, 429 S.W.2d 95 (1968); *Lambert v. Newman*, 245 Ark. 125, 431 S.W.2d 480 (1968); *Arkansas La. Gas Co. v. Moffitt*, 245 Ark. 992, 436 S.W.2d 91 (1969); *Skipper v. Hoskins*, 247 Ark. 235, 444 S.W.2d 875 (1969); *Branch v. Standard Title Co.*, 252 Ark. 737, 480 S.W.2d 568 (1972); *Dow Chem. Co. v.*

Bruce Rogers Co., 255 Ark. 448, 501 App. 160, 779 S.W.2d 190 (1989); In re S.W.2d 235 (1973); Gipson v. Tyson Foods, Horton Vaults, Inc., 109 B.R. 356 (Bankr. Inc., 272 Ark. 485, 615 S.W.2d 363 (1981); E.D. Ark. 1989); In re McCord, 219 B.R. Johnson v. Southern Elec., Inc., 29 Ark. 251 (Bankr. E.D. Ark. 1998).

18-44-102. Entire land subject to lien.

The entire land, to the extent stated in § 18-44-101, upon which any building, erection, or other improvement is situated including that part of the land which is not covered with the building, erection, or other improvement as well as that part of the land which is covered with it, shall be subject to all liens created by this subchapter to the extent, and only to the extent, of all the right, title, and interest owned therein by the owner or proprietor of the building, erection, or other improvement for whose immediate use or benefit the labor was done or things were furnished.

History. Acts 1895, No. 146, § 2, p. 217; C. & M. Dig., § 6908; Pope's Dig., § 8867; A.S.A. 1947, § 51-604.

CASE NOTES

Cited: Wood v. Hummel, 217 Ark. 617, 475, 414 S.W.2d 106 (1967); B.S.C., Inc. v. 232 S.W.2d 454 (1950); Mark's Sheet Metal, Inc. v. Republic Mtg. Co., 242 Ark. 475, 562 S.W.2d 600 (1978).

18-44-103. Improvements on leased land.

(a) Every building or other improvement erected or materials furnished, according to the provisions of this subchapter, on leased lots or lands shall be held for the debt contracted for, or on account of it, and also the leasehold term for the lot and land on which it is erected.

(b)(1) In case the lessee shall have forfeited his or her lease, the purchaser of the building and leasehold term, or so much of it as remains unexpired, under the provisions of this subchapter, shall be held to the assignee of the leasehold term and, as such, shall be entitled to pay to the lessor all arrears of rent or other money, interest, and costs due under the lease, unless the lessor shall have regained possession of the leasehold land, or obtained judgment for the possession of it on account of the noncompliance by the lessee with the terms of the lease, prior to the commencement of the improvements thereon.

(2) In this case the purchaser of the improvements under this subchapter shall have the right only to remove the improvements within sixty (60) days after he or she shall purchase them, and the owner of the ground shall receive the rent due him or her payable out of the proceeds of the sale, according to the terms of the lease, down to the time of removing the building.

History. Acts 1895, No. 146, § 4, p. 217; C. & M. Dig., § 6910; Pope's Dig., § 8869; A.S.A. 1947, § 51-606.

CASE NOTES

Municipalities.

Leasehold interests were subject to liens for material and labor even when

lessor and owner of property was municipality. *Dow Chem. Co. v. Bruce Rogers Co.*, 255 Ark. 448, 501 S.W.2d 235 (1973).

18-44-104. Liens for drain pipe or tile.

(a) Every contractor, subcontractor, or material supplier who shall furnish to any landowner any soil or drain pipe or tile for drainage of his or her land, or who shall put in soil or drain pipe or tile for any land, shall have a lien for each tract of forty (40) acres or less of the real estate upon which the soil or drain pipe or tile is placed for the payment of the lien.

(b)(1) The lien for the soil or drain pipe or tile shall attach to the real estate and all improvements thereon in preference to any subsequent liens, encumbrance, or mortgage executed upon the land after the purchase of the soil or drain pipe or tile.

(2) The lien shall be:

(A) Subject to the notice requirements of §§ 18-44-114 and 18-44-115;

(B) Filed under § 18-44-117; and

(C) Enforced under this subchapter.

History. Acts 1913, No. 253, §§ 1, 2; C. A.S.A. 1947, §§ 51-602, 51-603; Acts 2009, & M. Dig., § 6924; Pope's Dig., § 8886; No. 454, § 1.

18-44-105. Lien of architect, engineer, surveyor, appraiser, landscaper, abstractor, or title insurance agent.

(a) Every architect, engineer, surveyor, appraiser, landscaper, abstractor, or title insurance agent who shall do or perform any architectural, engineering, surveying, appraisal, landscaping, or abstracting services upon any land, or who shall issue a title insurance policy or provide landscaping supplies upon any land, building, erection, or improvement upon land, under or by virtue of any written agreement for the performance of the work with the owner thereof, or his or her agent, shall have a lien upon the land, building, erection, or improvement upon land to the extent of the agreed contract price or a reasonable price for those services.

(b)(1) However, the lien does not attach to the land, building, erection, or improvement upon land unless and until the lien is duly filed of record with the circuit clerk and recorder in the county in which the land, building, erection, or improvement is located.

(2) The lien shall be:

(A) Subject to the notice requirements of §§ 18-44-114 and 18-44-115;

(B) Filed under § 18-44-117; and

(C) Enforced under this subchapter.

History. Acts 1971, No. 291, § 1; A.S.A. 1947, § 51-642; Acts 2009, No. 454, § 1.

CASE NOTES

ANALYSIS

Construction.
Entitlement to Lien.

Construction.

Based on the Supreme Court of Arkansas's de novo interpretation of this section and § 18-44-110, the circuit court properly granted summary judgment as a matter of law by finding that a mortgage lien had priority over the engineer's lien, which was filed almost two years later. *Crafton, Tull, Sparks & Assocs. v. Ruskin Heights, LLC*, 2015 Ark. 1, 453 S.W.3d 667 (2015).

Supreme Court of Arkansas strictly construes this section and interprets its plain

meaning, which dictates that engineers shall have a lien, but that lien does not attach to the land, building, erection, or improvement upon the land unless and until the lien is duly filed of record. *Crafton, Tull, Sparks & Assocs. v. Ruskin Heights, LLC*, 2015 Ark. 1, 453 S.W.3d 667 (2015).

Entitlement to Lien.

A supplier is not entitled to an engineer's lien under this section, where the services were not done by a licensed engineer, and where notice under § 18-44-115 was not given. *Westside Galvanizing Servs., Inc. v. Georgia-Pacific Corp.*, 724 F. Supp. 644 (W.D. Ark. 1989), *aff'd*, 921 F.2d 735 (8th Cir. 1990).

18-44-106. "Owner" defined.

As used in this subchapter, the "owner" of property shall include the owner of the legal title to property and any person, including all cestui que trust, for whose immediate use, enjoyment, or benefit a building, erection, or other improvement is made.

History. Acts 1895, No. 146, § 22, p. § 8895; A.S.A. 1947, § 51-623; Acts 2009, 217; C. & M. Dig., § 6933; Pope's Dig., No. 454, § 1.

CASE NOTES

ANALYSIS

Administrators.
Lessors.
Oral Contract.
Vendees.

Administrators.

Lien cannot be obtained upon contract made with administrator. *Doke v. Benton County Lumber Co.*, 114 Ark. 1, 169 S.W. 327 (1914).

Lessors.

Lessor who consented to the improvement, bound the lessee to make the improvement, and expressly agreed to pay for the improvement by deducting the cost from the rent, made his property subject to the lien. *Whitcomb v. Gans*, 90 Ark. 469, 119 S.W. 676 (1909).

Oral Contract.

One having oral contract not enforceable is not "owner." *Sebastian Bldg. & Loan Ass'n v. Minten*, 181 Ark. 700, 27 S.W.2d 1011 (1930).

Vendees.

This section includes vendee in possession under written contract of purchase. *Fine v. Dyke Bros.*, 175 Ark. 672, 300 S.W. 375 (1927).

Where deed to property was placed in escrow until purchase money was paid, otherwise the deed was to be returned, the purchaser was not an "owner." *Mansfield Lumber Co. v. Gravette*, 177 Ark. 31, 5 S.W.2d 726 (1928).

Cited: *Daly v. Arkadelphia Milling Co.*, 126 Ark. 405, 189 S.W. 1053 (1916); *Morehart v. A.B. Beeler Lumber Co.*, 176 Ark. 818, 4 S.W.2d 29 (1928); *Hawkins v.*

Faubel, 182 Ark. 304, 31 S.W.2d 401 (1930).

18-44-107. Subcontractors — Definitions.

As used in this subchapter:

(1) "Contractor" means any person who contracts orally or in writing directly with a person holding an interest in real estate, or such person's agent, for the construction of any improvement to or repair of real estate;

(2) "Material supplier" means any person who supplies materials, goods, fixtures, or any other tangible item to the contractor or a subcontractor, or an individual having direct contractual privity with such persons;

(3) "Person" includes an individual, a partnership, a corporation, a limited liability organization, a trust, or any other business entity recognized by law; and

(4) "Subcontractor" means any person who supplies labor or services pursuant to a contract with the contractor, or to a person in direct privity of contract with such person.

History. Acts 1895, No. 146, § 24, p. § 8897; A.S.A. 1947, § 51-625; Acts 1995, 217; C. & M. Dig., § 6935; Pope's Dig., No. 1298, § 2.

RESEARCH REFERENCES

Ark. L. Notes. Circo, Put the Arkansas Construction Lien Notice Statute Out of Its Misery, 2008 Ark. L. Notes 3.

CASE NOTES

ANALYSIS

Contract with Owner or Agent.
Subcontractor.

Contract with Owner or Agent.

Where the owner of land agreed to pay for materials to be furnished for the erection of a building and such materials were furnished in reliance upon such promise, the materialman is not a subcontractor but is entitled to recover upon an original undertaking. *Leifer Mfg. Co. v. Gross*, 93 Ark. 277, 124 S.W. 1039 (1910).

Person furnishing material to owner is not a subcontractor. *Hess v. A.L. Ferguson*

Lumber Co., 155 Ark. 240, 244 S.W. 5 (1922).

Company furnishing material to agent of owner is not a subcontractor. *Arkmo Lumber Co. v. Cantrell*, 159 Ark. 445, 252 S.W. 901 (1923).

Subcontractor.

One who performs labor for a contractor is a subcontractor. *Buckley v. Taylor*, 51 Ark. 302, 11 S.W. 281 (1889) (decision under prior law).

Cited: *Valley Metal Works, Inc. v. A.O. Smith-Inland, Inc.*, 264 Ark. 341, 572 S.W.2d 138 (1978).

18-44-108. Refusal to list parties doing work or furnishing materials.

(a) The owner or proprietor, material supplier, subcontractor, or anyone interested as mortgagee or trustee in the real estate upon which

improvements are made under this subchapter may apply at any time to the contractor or subcontractor for the following:

(1) A list of all parties doing work or furnishing material for a building and the amount due to each of the parties; and

(2) Certification that the owner or agent has received the preliminary notice specified under § 18-44-115(a), if applicable.

(b) Any contractor or subcontractor who, upon request, refuses or fails within five (5) business days to give a correct list of the parties furnishing material or doing labor on the building and the amount due to each or who falsely certifies that an owner or agent has received the preliminary notice specified under § 18-44-115 shall be:

(1) Guilty of a violation and upon conviction shall be punished by a fine not exceeding two thousand five hundred dollars (\$2,500); and

(2)(A) Subject to suit by an aggrieved party in the circuit court where the property is located to enforce subsection (a) of this section including without limitation by the contempt powers of the circuit court.

(B) The prevailing party in an action under this subdivision (b)(2) shall receive a judgment for any damages proximately caused by the violation of this subsection, the costs of the action, and a reasonable attorney's fee.

History. Acts 1895, No. 146, § 10, p. No. 1298, § 3; 2005, No. 1994, § 96; 2009, 217; C. & M. Dig., § 6921; Pope's Dig., No. 454, § 2.
§ 8880; A.S.A. 1947, § 51-612; Acts 1995,

18-44-109. Unlawful to use materials other than as designated.

Any contractor or subcontractor who shall purchase materials on credit and represent at the time of purchase that they are to be used in a designated building or other improvement and shall thereafter use, or cause to be used, the materials in the construction of any building or improvement other than that designated without the written consent of the person from whom the materials were purchased with intent to defraud that person shall be guilty of a violation if the materials were valued at one thousand dollars (\$1,000) or more and upon conviction shall be punished by a fine not exceeding two thousand five hundred dollars (\$2,500).

History. Acts 1895, No. 146, § 10, p. § 8880; A.S.A. 1947, § 51-612; Acts 1995, 217; C. & M. Dig., § 6921; Pope's Dig., No. 1298, § 4; 2005, No. 1994, § 97.

CASE NOTES

Presumption.

Where materials are furnished to a contractor of a building, the presumption is that they were furnished on the credit of the building and its owner; and unless this presumption is rebutted by proof that

they were purchased on the personal credit of the contractor, they will not be subject to attachment at the instance of the contractor's creditors. *Pratt v. Nakdimen*, 99 Ark. 293, 138 S.W. 974 (1911).

18-44-110. Preference over prior liens — Exception.

(a)(1) The liens for labor performed or material or fixtures furnished, as provided for in this subchapter, shall have equal priority toward each other without regard to the date of filing the account or lien or the date when the particular labor or material was performed or furnished. All such liens shall date from the time that the construction or repair first commenced.

(2) Construction or repair commences when there is a visible manifestation of activity on real estate that would lead a reasonable person to believe that construction or repair of an improvement to the real estate has begun or will soon begin, including, but not limited to, the following:

(A) Delivery of a significant amount of lumber, bricks, pipe, tile, or other building material to the site;

(B) Grading or excavating the site;

(C) Laying out lines or grade stakes; or

(D) Demolition in an existing structure.

(3) In all cases in which a sale shall be ordered and the property sold, and the proceeds arising from the sale are not sufficient to discharge in full all the liens against the property without reference to the date of filing the account or lien, the proceeds shall be paid pro rata on the respective liens.

(b)(1)(A) The liens for labor performed or materials or fixtures furnished, as provided for in this subchapter, shall attach to the improvement on which the labor was performed or the materials or fixtures were furnished in preference to any encumbrance existing on the real estate prior to the commencement of construction or repair of the improvement.

(B) In all cases in which the prior encumbrance was given for the purpose of funding construction or repair of the improvement, that lien shall have priority over all liens given by this subchapter.

(2) The liens, as provided for in this subchapter, shall be enforced by foreclosure, as further provided for in this subchapter, and the property ordered sold subject to the lien of the prior encumbrance on the real estate.

(c) The lien for labor performed and materials or fixtures furnished, as provided for in this subchapter, shall have priority over all other encumbrances that attach to the real estate or improvements thereon subsequent to commencement of construction or repair.

History. Acts 1895, No. 146, § 3, p. § 8868; A.S.A. 1947, § 51-605; Acts 1995, 217; C. & M. Dig., § 6909; Pope's Dig., No. 1298, § 5.

RESEARCH REFERENCES

Ark. L. Rev. Subordination of Mortgage Security to a Negotiable Promissory Note, 5 Ark. L. Rev. 183.

The Extent of the Debts Secured by a Mortgage in Arkansas, 9 Ark. L. Rev. 45.

Problems of Escrow and Loan Closing, 13 Ark. L. Rev. 34.

Note, BB & B Construction Company v. F.D.I.C. — Mechanics' and Materialmen's Liens in Arkansas: Priority as a Function of Removability, 48 Ark. L. Rev. 783.

Note, The Vendor's Lien Revisited in Agri Bank FCB v. Maxfield, 49 Ark. L. Rev. 353.

CASE NOTES

ANALYSIS

Construction.

Commencement of Improvement.

Mortgages.

Multiple Structures.

Payments to Other Lienholders.

Prior Mortgages.

—Construction Mortgages.

— —Future Advances.

—Rebuilt Structures.

—Unrecorded Mortgages.

Purchasers of Mortgage Notes.

Subsequent Purchasers.

Use of Loan.

Vendors' Liens.

Construction.

Although § 18-44-101 provides which materialman shall receive protection by a land improvement lien as well as the nature and the extent of the lien, this section still sets forth the priority of these liens to other encumbrances and the nature of the lien's attachment. *BB & B Constr. Co. v. FDIC*, 316 Ark. 663, 875 S.W.2d 48 (1994).

Despite the 1969 amendment to § 18-44-101(a), the law remains that as between the lien of a mechanic or the furnisher of material and the lien of a prior mortgage, the lien of the former is superior only upon a separate building constructed on the land with the labor and material furnished, or to such an addition as is separable from the original building; as between a materialman and a prior mortgagor, "first-in-time, first in right" is the law in Arkansas unless the materialman can remove the improvements from the land. *BB & B Constr. Co. v. FDIC*, 316 Ark. 663, 875 S.W.2d 48 (1994).

Although a materialman's lien was considered to relate back to the date on which the particular material was furnished, a

materials supplier that filed a materialman's lien on property after a bank had filed a foreclosure complaint and a lis pendens on the same property was subject to the lis pendens because the supplier did not obtain an interest in the property prior to the filing of the lis pendens. *Nat'l Home Ctrs., Inc. v. Coleman*, 373 Ark. 246, 283 S.W.3d 218 (2008).

Based on the Supreme Court of Arkansas's de novo interpretation of § 18-44-105 and this section, the circuit court properly granted summary judgment as a matter of law by finding that a mortgage lien had priority over the engineer's lien, which was filed almost two years later. *Crafton, Tull, Sparks & Assocs. v. Ruskin Heights, LLC*, 2015 Ark. 1, 453 S.W.3d 667 (2015).

Given a strict construction of this section, the Supreme Court of Arkansas concludes that any relate-back provisions do not apply to engineer's liens and that this section does not allow for an engineer's lien to relate back to the date of construction. *Crafton, Tull, Sparks & Assocs. v. Ruskin Heights, LLC*, 2015 Ark. 1, 453 S.W.3d 667 (2015).

Commencement of Improvement.

Where work was commenced by a plumbing contractor prior to the time other liens and mortgages attached to the property, his lien was entitled to priority regardless of how little he might have done before the other liens attached. *Shaw v. Rackensack Apt. Corp.*, 174 Ark. 492, 295 S.W. 966 (1927).

The lien of a contractor whose only work on the premises prior to the recording of a construction mortgage consisted of inspecting and measuring the premises and driving a wooden peg to locate the center of the house had no priority over the mortgage. *Mark's Sheet Metal, Inc. v. Re-*

public Mtg. Co., 242 Ark. 475, 414 S.W.2d 106 (1967).

Preparatory work, such as grading, removal of debris, and demolition of existing structures, which is not visible notice that a building is about to be erected does not constitute commencement of work so as to give the lien for such work priority over a subsequently recorded construction mortgage. *Clark v. GE Co.*, 243 Ark. 399, 420 S.W.2d 830 (1967).

The installment of a wall box containing electrical equipment on a pole located on unplanted and unimproved land did not constitute commencement of work so as to give priority to the materialman over a subsequently recorded mortgage. *Jim Walter Homes, Inc. v. Bowling*, 258 Ark. 28, 521 S.W.2d 828 (1975).

Labor and materials supplied by materialmen, preparatory work for the construction of a dwelling house, constituted commencement of improvements, hence affording the lien of the materialmen priority over a mortgage, filed subsequently to such work, securing a construction loan. *Worthen Bank & Trust Co. v. Walker*, 270 Ark. 868, 606 S.W.2d 382 (1980).

Trial court erred in finding that construction on a project did not commence until after the filing of the lender's mortgage by considering the parties' intent; under subdivision (a)(2) of this section, the trial court should have considered whether there was a visible manifestation of activity on the property that would show that construction had begun or would soon begin. *May Constr. Co. v. Town Creek Constr. & Dev., LLC*, 2011 Ark. 281, 383 S.W.3d 389 (2011).

Mortgages.

Materialman's lien was superior to mortgage executed after work began, though money had been advanced before. *Cook v. Moore*, 152 Ark. 590, 239 S.W. 750 (1922).

Furnishing portion of material before filing mortgage gives first lien. *Ferguson Lumber Co. v. Scriber*, 162 Ark. 349, 258 S.W. 353 (1924).

Mortgage filed after work commences will be subordinate to any liens based on the commenced work. *Dempsey v. Merchants Nat'l Bank*, 292 Ark. 207, 729 S.W.2d 150 (1987).

Under subsection (b) of this section a materialmen's lien enjoys priority over a

mortgage without regard to whether the improvements are removable. *Simmons First Bank of Ark. v. Bob Callahan Servs.*, 340 Ark. 692, 13 S.W.3d 570 (2000).

Multiple Structures.

Liens of a materialman who furnished material for seven houses under a single contract and of laborers who performed labor on the houses separately were of equal dignity. *Rust v. Kelley Bros. Lumber Co.*, 180 Ark. 517, 21 S.W.2d 973 (1929).

Payments to Other Lienholders.

One who has perfected his lien in the manner prescribed by statute cannot be defeated of his lien by any payments that may be made to other bona fide lien claimants. *Long v. Charles T. Abeles & Co.*, 77 Ark. 156, 93 S.W. 67 (1905).

Mortgagee did not defeat the priority of liens of subsequent materialmen who furnished materials after the recording of the construction money mortgage by paying a materialman who furnished materials prior to the recording of the mortgage; liens of the subsequent materialmen related back to commencement of construction of the home and were on an equality with that of the first materialman. *Planters Lumber Co. v. Jack Collier E. Co.*, 234 Ark. 1091, 356 S.W.2d 631 (1962).

Prior Mortgages.

In order to give a lien to a mechanic or a material furnisher superior to a prior mortgage, the improvement must be separate from the original improvement, or, if connected with the original improvement, it must be so connected as to be removable without injury to the original building. *Imboden v. Citizens' Bank*, 163 Ark. 615, 260 S.W. 734 (1924); *Fine v. Dyke Bros.*, 175 Ark. 672, 300 S.W. 375 (1927); *Morrilton Lumber Co. v. Groom*, 176 Ark. 520, 3 S.W.2d 293 (1928).

—Construction Mortgages.

Where materialman sued to foreclose statutory lien on buildings erected by bankrupt contractor, fact that party who had financed contractor had taken prior construction money mortgage did not affect the lien since mortgage did not contain requisite language showing "purpose" for which money was loaned to contractor. *Jack Collier E. Co. v. E.C. Barton & Co.*, 228 Ark. 300, 307 S.W.2d 863 (1957).

Where a materialman furnished materials for construction of home prior to the

recording of the construction money mortgage, the mortgagee, by paying the materialman, did not defeat the priority of liens of subsequent materialmen who furnished materials after the recording of the mortgage, as their liens related back to commencement of construction of the home and were on an equality with that of the first materialman. *Planters Lumber Co. v. Jack Collier E. Co.*, 234 Ark. 1091, 356 S.W.2d 631 (1962).

A construction mortgage had priority over a subsequent materialmen's lien as to proceeds of the mortgage advanced for labor and materials, but not as to money retained by the mortgagee for the purchase price of the ground nor as to money paid by the disbursing agent to the mortgagee for interest. *Planters Lumber Co. v. Wilson Co.*, 241 Ark. 1005, 413 S.W.2d 55 (1967).

A construction mortgage had priority over the lien of a contractor whose only work on the premises prior to the recording of the mortgage consisted of inspecting and measuring the premises and driving a wooden peg to locate the center of the house. *Mark's Sheet Metal, Inc. v. Republic Mtg. Co.*, 242 Ark. 475, 414 S.W.2d 106 (1967).

Construction mortgages held valid and to have preference over suppliers. *National Lumber Co. v. Advance Dev. Corp.*, 293 Ark. 1, 732 S.W.2d 840 (1987).

—Future Advances.

Where mortgagee under recorded mortgage was obligated to make future advances for construction of tourist cabin, its lien was superior to mechanic's lien of materialmen who furnished material used in construction of cabins. *Ashdown Hdwe. Co. v. Hughes*, 223 Ark. 541, 267 S.W.2d 294 (1954).

A mortgage that recited that the loan secured should be used to construct a dwelling house on the mortgaged premises and that the mortgage should cover and secure future advances was not a construction loan as to future advances since the mortgagee was not obligated to make future advances. *Lyman Lamb Co. v. Union Bank*, 237 Ark. 629, 374 S.W.2d 820 (1964).

The mortgagee of a mortgage securing future advances of funds "to be used solely for and in construction of a one family residence" was not entitled to priority over

materialmen's liens as to funds used to satisfy a prior existing mortgage and to pay the balance due on the purchase price of the building site. *House v. Scott*, 244 Ark. 1075, 429 S.W.2d 108 (1968).

—Rebuilt Structures.

A materialman's lien cannot be acquired upon land, as distinguished from the building, for materials furnished in rebuilding a house thereon which was destroyed by fire as against mortgages filed prior to the furnishing of such material. *Barton Lumber & Brick Co. v. Caraway*, 178 Ark. 1034, 13 S.W.2d 586 (1929).

A materialman's lien on a house rebuilt after being destroyed by fire is superior to a prior mortgage covering both land and improvements, and it is immaterial that the insurance money covering the destroyed house was in part used to erect the new one. *Barton Lumber & Brick Co. v. Caraway*, 178 Ark. 1034, 13 S.W.2d 586 (1929).

—Unrecorded Mortgages.

An unrecorded mortgage, even though executed before work upon which mechanics' liens are based was done, will not take precedence over mechanics' liens perfected according to statute. *O'Neill v. Lyric Amusement Co.*, 119 Ark. 454, 178 S.W. 406 (1915).

Even though materialman knew that mortgagee was furnishing money for construction, that knowledge would not make mortgage superior to lien of materialman where mortgage was not recorded. *Jack Collier E. Co. v. E.C. Barton & Co.*, 228 Ark. 300, 307 S.W.2d 863 (1957).

Purchasers of Mortgage Notes.

An innocent purchaser of a note secured by a mortgage given to a contractor does not have lien prior to those of subcontractors, laborers, and materialmen who subsequently furnished labor and material in making the improvement. *Home Oil Co. v. Helton*, 179 Ark. 132, 14 S.W.2d 549 (1929).

Subsequent Purchasers.

Purchasers of an interest in real estate, after the accrual of a materialman's lien thereon and within the statutory period allowed to file a lien after the materials had been furnished, are not innocent purchasers of the property but take subject to the lien. *Bell v. Koontz*, 172 Ark. 870, 290

S.W. 597 (1927); *Owen v. Continental Supply Co.*, 175 Ark. 741, 300 S.W. 398 (1927).

Use of Loan.

The test of priority is the purpose of the loan, and not the use actually made of it. *Sebastian Bldg. & Loan Ass'n v. Minten*, 181 Ark. 700, 27 S.W.2d 1011 (1930); *Spickes Bros. Painting Contractors v. Worthen Bank & Trust Co.*, 299 Ark. 79, 771 S.W.2d 258 (1989).

Where portion of money loaned was used to pay off mortgage on premises and balance was for future advances for construction of tourist cabins on premises, the portion of money used to pay off prior mortgage was indirectly, if not directly, used to improve owner's property and was entitled to priority over subsequent mechanics' liens. *Ashdown Hdwe. Co. v. Hughes*, 223 Ark. 541, 267 S.W.2d 294 (1954).

When a construction lender has permitted or known that funds were not to be used for improvements, the lender cannot claim priority as to the amount not spent for improvements. *Spickes Bros. Painting Contractors v. Worthen Bank & Trust Co.*, 299 Ark. 79, 771 S.W.2d 258 (1989).

Vendors' Liens.

Where one in possession of land under a contract of purchase contracts for im-

provements, the vendor's lien for the purchase price is, as to the land, superior to the lien for labor and material in making the improvements. *Gunter v. Ludlam*, 155 Ark. 201, 244 S.W. 348 (1922).

The lien for material for building a garage, furnished to a purchaser in possession prior to the vendor's exercise of his option to declare a contract rescinded for default, is superior to the vendor's lien with respect to the garage. *Judd v. Rieff*, 174 Ark. 362, 295 S.W. 370 (1927).

Where a contract for the sale of land stipulated that certain improvements should be made, a materialman's lien was superior to the vendor's lien for the purchase money. *People's Bldg. & Loan Ass'n v. Leslie Lumber Co.*, 183 Ark. 800, 38 S.W.2d 759 (1931).

Cited: *Leiper & Mills v. Minnig*, 74 Ark. 510, 86 S.W. 407 (1905); *Martin v. Blytheville Water Co.*, 115 Ark. 230, 170 S.W. 1019 (1914); *Dermott State Bank v. Parker Lumber Co.*, 233 Ark. 138, 342 S.W.2d 676 (1961); *Dempsey v. McGowan*, 291 Ark. 147, 722 S.W.2d 848 (1987); *In re McCord*, 219 B.R. 251 (Bankr. E.D. Ark. 1998); *Hall Contr. Corp. v. Entergy Servs.*, 309 F.3d 468 (8th Cir. 2002).

18-44-111, 18-44-112. [Repealed.]

Publisher's Notes. These sections, concerning preferences over subsequent encumbrances and the equality of liens, were repealed by Acts 1995, No. 1298, § 6. The sections were derived from the following sources:

18-44-111. Acts 1895, No. 146, § 5, p. 217; C. & M. Dig., § 6911; Pope's Dig., § 8870; A.S.A. 1947, § 51-607.

18-44-112. Acts 1895, No. 146, § 9, p. 217; C. & M. Dig., § 6920; Pope's Dig., § 8879; A.S.A. 1947, § 51-611.

18-44-113. Assignment of liens.

(a) The lien given in this subchapter shall be transferable and assignable, but it shall not be enforced against the owner of the ground or buildings unless the owner of the ground or buildings shall have actual notice of the assignment or notice under subsection (b) of this section.

(b) The owner of the ground or buildings shall be considered to have actual notice if within thirty (30) days of the assignment a copy of the assignment is:

- (1) Hand delivered to the owner of the ground or buildings;
- (2) Mailed to the last known address of the owner of the ground or buildings and verified by a:

(A) Return receipt signed by the addressee or the agent of the addressee; or

(B) Returned envelope, postal document, or affidavit by a postal employee reciting or showing refusal of the notice by the addressee or that the item was unclaimed; or

(3) Delivered by any means that provides written, third-party verification of delivery at any place that the owner of the ground or buildings maintains an office, conducts business, or resides.

History. Acts 1895, No. 146, § 25, p. 217; C. & M. Dig., §§ 6907, 6936; Pope's Dig., §§ 8866, 8898; A.S.A. 1947, § 51-626; Acts 2009, No. 454, § 3.

Cross References. Rights under assigned contracts, § 4-58-107.

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Actual Notice.

The requirement of "actual notice" at least contemplates a notice reasonably contemporaneous with the assignment of the lien and since the requirement of notice is not conditioned upon actual prejudice, there is a time beyond which the giving of notice of the assignment will not be sanctioned. *Carter-Fleming v. Kirby Bldg. Sys.*, 270 Ark. 149, 603 S.W.2d 421 (1980).

Where landowners did not receive actual notice of the assignment of a lien against their land until seven months

after the assignment when the assignee sought to enforce the lien, the notice requirement of this section was violated. *Carter-Fleming v. Kirby Bldg. Sys.*, 270 Ark. 149, 603 S.W.2d 421 (1980).

Parties.

The rights of the lienor in a claim for a mechanic's lien may be assigned and the original claimant is not a necessary party to the action. *E.O. Barnett Bros. v. Wright*, 116 Ark. 44, 172 S.W. 254 (1914).

Perfection Before Assignment.

The lien must be perfected before it can be assigned. *Young Men's Bldg. Ass'n v. Ware*, 158 Ark. 137, 249 S.W. 545 (1923); *Superior Lumber Co. v. National Bank of Commerce*, 176 Ark. 300, 2 S.W.2d 1093 (1928); *Middleton v. Watkins Hdwe. Co.*, 196 Ark. 133, 116 S.W.2d 1043 (1938).

18-44-114. Notice and service generally.

(a) Every person who may wish to avail himself or herself of the benefit of the provisions of this subchapter shall give ten (10) days' notice before the filing of the lien, as required in § 18-44-117(a), to the owner of a building or improvement that he or she holds a claim against the building or improvement, setting forth the amount and from whom it is due.

(b)(1) The notice may be served by any:

(A) Officer authorized by law to serve process in a civil action;

(B) Person who would be a competent witness;

(C) Form of mail addressed to the person to be served, with a return receipt requested and delivery restricted to the addressee or the agent of the addressee; or

(D) Means that provides written, third-party verification of delivery at any place where the owner of the building or improvement maintains an office, conducts business, or resides.

(2)(A)(i) When served by an officer, his or her official return endorsed on the notice shall be proof of the service.

(ii) When served by any other person, the fact of the service shall be verified by affidavit of the person serving the notice.

(B)(i) When served by mail, the service shall be:

(a) Complete when mailed; and

(b) Verified by a return receipt signed by the addressee or the agent of the addressee, or a returned envelope, postal document, or affidavit by a postal employee reciting or showing refusal of the notice by the addressee or that the item was unclaimed.

(ii) If delivery of the mailed notice is refused by the addressee or the item is unclaimed:

(a) The lien claimant shall immediately send the owner of the building or improvement a copy of the notice by first class mail and may proceed to file his or her lien; and

(b) The unopened original of the item marked unclaimed or refused by the United States Postal Service shall be accepted as proof of service as of the postmarked date of the item.

History. Acts 1895, No. 146, § 6, p. 217; C. & M. Dig., § 6917; Pope's Dig., § 8876; A.S.A. 1947, § 51-608; Acts 1991, No. 588, § 1; 1999, No. 1466, § 1; 2005, No. 2287, § 5; 2009, No. 454, § 3.

RESEARCH REFERENCES

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CASE NOTES

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Construction.
Agents.
Commencement of Action.
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Contents.
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Pleading.
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Settlement.
Strict Compliance.

Construction.

This section is to be liberally construed in favor of the lien claimant. Wildwood

Amusement Co. v. Stout Lumber Co., 178 Ark. 977, 12 S.W.2d 911 (1929).

Agents.

Object of the notice is for the benefit and protection of the owner, and to be served on an agent, it must be such an agent as would be required to report to his principal. *Ellis v. Fayetteville Lumber & Cement Co.*, 195 Ark. 385, 112 S.W.2d 613 (1938); *Bell v. Apache Supply Co.*, 300 Ark. 494, 780 S.W.2d 529 (1989).

The agent to whom notice may be given must be an agent the owner has expressly vested with authority to receive notice, or referred to as the one to whom notice

might be given, or be an agent of general authority, in such managerial or directing situation with reference to the construction of the building as would constitute him the alter ego of the owner. *Shannon Supply Co. v. Avey*, 240 Ark. 997, 403 S.W.2d 87 (1966); *Bell v. Apache Supply Co.*, 300 Ark. 494, 780 S.W.2d 529 (1989).

Tenant held not an agent for the purpose of receiving notice of intention to file a lien against landowners' property. *Bell v. Apache Supply Co.*, 300 Ark. 494, 780 S.W.2d 529 (1989).

Commencement of Action.

The institution of a suit by a materialman to enforce a lien for materials furnished cures the omission to comply with this section where the suit is brought before the expiration of the statutory period within which liens may be enforced. *Pfeiffer Stone Co. v. Brogdon*, 125 Ark. 426, 188 S.W. 1187 (1916); *Robins v. East Arkansas Builders Supply Co.*, 199 Ark. 1174, 199 Ark. 1174, 137 S.W.2d 924 (1940).

Where suit was not brought within the statutory period, the lien claimant was not relieved from filing the account and giving the notice. *St. Mathews Church v. White*, 172 Ark. 1152, 291 S.W. 977 (1927).

It would not be necessary for appellee to comply with either § 18-44-101 creating a lien in favor of the party or this section by which he could have given the required notice provided he commenced a suit against the necessary parties within the statutory period after the last item was furnished. *Burks v. Sims*, 230 Ark. 170, 321 S.W.2d 767 (1959).

Compliance.

This section must be substantially complied with. *Conway Lumber Co. v. Hardin*, 119 Ark. 43, 177 S.W. 408 (1915); *Wildwood Amusement Co. v. Stout Lumber Co.*, 178 Ark. 977, 12 S.W.2d 911 (1929).

Failure to give the notice required by this section is fatal to a lien or a personal judgment against the owner. *Hirsch v. Farris*, 174 Ark. 1040, 298 S.W. 487 (1927); *Bell v. Apache Supply Co.*, 300 Ark. 494, 780 S.W.2d 529 (1989).

Where materialman failed to give ten days' statutory notice of intention to hold a lien for material furnished, he was only entitled to a judgment against owner for amount of material furnished and was not

entitled to a mechanic's lien. *Ashdown Hdwe. Co. v. Hughes*, 223 Ark. 541, 267 S.W.2d 294 (1954).

Subcontractor did not acquire a mechanic's and materialman's lien on a home, notwithstanding that the subcontractor gave the homeowner the notice required by this section, because neither the subcontractor nor the contractor provided the notice required by § 18-44-115. *Bryant v. Jim Atkinson Tile*, 100 Ark. App. 408, 269 S.W.3d 383 (2007).

Contents.

Notice which did not set forth the amount claimed and from whom the same was due was defective. *Scott v. Le Grande*, 225 Ark. 1022, 287 S.W.2d 456 (1956).

A subcontractor's notice of lien addressed to both the owners of the premises and the general contractor, which stated the amount due, was not defective for failure to state from whom it was due. *Bobo v. Seebree*, 244 Ark. 915, 429 S.W.2d 95 (1968).

Exceptions.

The notice is not required if the owner himself purchased the material or employed the labor. *Malone v. Holly Grove Lumber Co.*, 148 Ark. 242, 229 S.W. 716 (1921); *Hess v. A.L. Ferguson Lumber Co.*, 155 Ark. 240, 244 S.W. 5 (1922); *Brannan v. Paul Sanders & Son*, 201 Ark. 306, 144 S.W.2d 474 (1940).

A company furnishing material under a contract with the owner's agent is not required to give the notice provided for in this section. *Arkmo Lumber Co. v. Cantrell*, 159 Ark. 445, 252 S.W. 901 (1923).

Whether materialman sold materials directly to owner so as not to be required to give notice before filing lien was for trial court upon disputed evidence. *Trinity Universal Ins. Co. v. Willbanks*, 201 Ark. 386, 144 S.W.2d 1092 (1940).

The original contractor is not required to give the required notice to the owner. *Rea v. Lammers*, 212 Ark. 792, 207 S.W.2d 740 (1948).

Pleading.

A question as to whether notice of a mechanic's lien was given will not be considered on appeal if it was not raised by the pleadings nor determined by the lower court. *Whitcomb v. Gans*, 90 Ark. 469, 119 S.W. 676 (1909); *Morehart v. A.B.*

Beeler Lumber Co., 176 Ark. 818, 4 S.W.2d 29 (1928).

Where the complaint alleged compliance with this section which was not denied in the answer, the allegation was taken as confessed. *Jones v. J.C. Stephenson Lumber Co.*, 149 Ark. 670, 234 S.W. 263 (1921).

Service.

Notice not served in person by a person authorized to serve the notice under this section was not a valid notice. *Scott v. Le Grande*, 225 Ark. 1022, 287 S.W.2d 456 (1956).

Mailing of notice by registered mail was an insufficient compliance with this section. *Scott v. Le Grande*, 225 Ark. 1022, 287 S.W.2d 456 (1956).

Settlement.

Agreement by trustees with company suing to enforce materialman's lien which was reached before the expiration of statutory period required by § 18-44-117 rendered unnecessary further service on trustees and estopped them from pleading

suit was not brought in time. *Robins v. East Arkansas Builders Supply Co.*, 199 Ark. 1174, 199 Ark. 1174, 137 S.W.2d 924 (1940).

Strict Compliance.

The notice provisions contained in the statute are to be strictly construed, thus requiring strict compliance; they cannot be satisfied by substantial compliance. *Books-A-Million, Inc. v. Cockerman Constr. Co.*, 340 Ark. 467, 10 S.W.3d 857 (2000).

Cited: *Leifer Mfg. Co. v. Gross*, 93 Ark. 277, 124 S.W. 1039 (1910); *Doke v. Benton County Lumber Co.*, 114 Ark. 1, 169 S.W. 327 (1914); *Franks v. Wood*, 217 Ark. 10, 228 S.W.2d 480 (1950); *B.S.C., Inc. v. McKinney*, 263 Ark. 110, 562 S.W.2d 600 (1978); *Lowe's of Ark., Inc. v. Bush*, 282 Ark. 508, 669 S.W.2d 198 (1984); *Duncan v. Davis & Earnest, Inc.*, 285 Ark. 143, 685 S.W.2d 509 (1985); *American Nat'l Bank v. Dux*, 286 Ark. 309, 691 S.W.2d 851 (1985); *Westside Galvanizing Services, Inc. v. Georgia-Pacific Corp.*, 921 F.2d 735 (8th Cir. 1990).

18-44-115. Notice to owner by contractor — Definitions.

(a)(1) No lien upon residential real estate containing four (4) or fewer units may be acquired by virtue of this subchapter unless the owner of the residential real estate, the owner's authorized agent, or the owner's registered agent has received, by personal delivery or by certified mail, a copy of the notice set out in this subsection.

(2) The notice required by this subsection shall not require the signature of the owner of the residential real estate, the owner's authorized agent, or the owner's registered agent in an instance when the notice is delivered by certified mail.

(3) It shall be the duty of the residential contractor to give the owner, the owner's authorized agent, or the owner's registered agent the notice set out in this subsection on behalf of all potential lien claimants before the commencement of work.

(4) If a residential contractor fails to give the notice required under this subsection, then the residential contractor is barred from bringing an action either at law or in equity, including without limitation quantum meruit, to enforce any provision of a residential contract.

(5)(A) Any potential lien claimant may also give notice.

(B)(i) If before commencing work or supplying goods a subcontractor, material supplier, laborer, or other lien claimant gives notice under this section, the notice shall be effective for all subcontractors, material suppliers, laborers, and other lien claimants notwithstanding that the notice was given after the project commences as defined under § 18-44-110(a)(2).

(ii) If the notice relied upon by a lien claimant to establish a lien under this subchapter is given by another lien claimant under subdivision (a)(5)(B)(i) of this section after the project commences, the lien of the lien claimant shall secure only the labor, material, and services supplied after the effective date of the notice under subdivision (a)(5)(B)(i) of this section.

(C) However, no lien may be claimed by any subcontractor, laborer, material supplier, or other lien claimant unless the owner of the residential real estate, the owner's authorized agent, or the owner's registered agent has received at least one (1) copy of the notice, which need not have been given by the particular lien claimant.

(6) A residential contractor who fails to give the notice required by this subsection is guilty of a violation pursuant to § 5-1-108 and upon pleading guilty or nolo contendere to or being found guilty of failing to give the notice required by this subsection shall be punished by a fine not exceeding one thousand dollars (\$1,000).

(7) The notice set forth in this subsection may be incorporated into the contract or affixed to the contract and shall be conspicuous, set out in boldface type, worded exactly as stated in all capital letters, and shall read as follows:

"IMPORTANT NOTICE TO OWNER

I UNDERSTAND THAT EACH CONTRACTOR, SUBCONTRACTOR, LABORER, SUPPLIER, ARCHITECT, ENGINEER, SURVEYOR, APPRAISER, LANDSCAPER, ABSTRACTOR, OR TITLE INSURANCE AGENT SUPPLYING LABOR, SERVICES, MATERIAL, OR FIXTURES IS ENTITLED TO A LIEN AGAINST THE PROPERTY IF NOT PAID IN FULL FOR THE LABOR, SERVICES, MATERIALS, OR FIXTURES USED TO IMPROVE, CONSTRUCT, OR INSURE OR EXAMINE TITLE TO THE PROPERTY EVEN THOUGH THE FULL CONTRACT PRICE MAY HAVE BEEN PAID TO THE CONTRACTOR. I REALIZE THAT THIS LIEN CAN BE ENFORCED BY THE SALE OF THE PROPERTY IF NECESSARY. I AM ALSO AWARE THAT PAYMENT MAY BE WITHHELD TO THE CONTRACTOR IN THE AMOUNT OF THE COST OF ANY SERVICES, FIXTURES, MATERIALS, OR LABOR NOT PAID FOR. I KNOW THAT IT IS ADVISABLE TO, AND I MAY, REQUIRE THE CONTRACTOR TO FURNISH TO ME A TRUE AND CORRECT FULL LIST OF ALL SUPPLIERS AND SERVICE PROVIDERS UNDER THE CONTRACT, AND I MAY CHECK WITH THEM TO DETERMINE IF ALL MATERIALS, LABOR, FIXTURES, AND SERVICES FURNISHED FOR THE PROPERTY HAVE BEEN PAID FOR. I MAY ALSO REQUIRE THE CONTRACTOR TO PRESENT LIEN WAIVERS BY ALL SUPPLIERS AND SERVICE PROVIDERS, STATING THAT THEY HAVE BEEN PAID IN FULL FOR SUPPLIES AND SERVICES

PROVIDED UNDER THE CONTRACT, BEFORE I PAY THE CONTRACTOR IN FULL. IF A SUPPLIER OR OTHER SERVICE PROVIDER HAS NOT BEEN PAID, I MAY PAY THE SUPPLIER OR OTHER SERVICE PROVIDER AND CONTRACTOR WITH A CHECK MADE PAYABLE TO THEM JOINTLY.

SIGNED: _____

ADDRESS OF PROPERTY _____

DATE: _____

I HEREBY CERTIFY THAT THE SIGNATURE ABOVE IS THAT OF THE OWNER, REGISTERED AGENT OF THE OWNER, OR AUTHORIZED AGENT OF THE OWNER OF THE PROPERTY AT THE ADDRESS SET OUT ABOVE.

CONTRACTOR”

(8)(A) If the residential contractor supplies a performance and payment bond or if the transaction is a direct sale to the property owner, the notice requirement of this subsection shall not apply, and the lien rights arising under this subchapter shall not be conditioned on the delivery and execution of the notice.

(B) A sale shall be a direct sale only if the owner orders materials or services from the lien claimant.

(b)(1)(A) The General Assembly finds that owners and developers of commercial real estate are generally knowledgeable and sophisticated in construction law, are aware that unpaid laborers, subcontractors, and material suppliers are entitled to assert liens against the real estate if unpaid, and know how to protect themselves against the imposition of mechanics' and material suppliers' liens.

(B) The General Assembly further finds that consumers who construct or improve residential real estate containing four (4) or fewer units generally do not possess the same level of knowledge and awareness and need to be informed of their rights and responsibilities.

(2) As used in this subsection:

(A) “Commercial real estate” means:

(i) Nonresidential real estate; and

(ii) Residential real estate containing five (5) or more units; and

(B) “Service provider” means an architect, an engineer, a surveyor, an appraiser, a landscaper, an abstractor, or a title insurance agent.

(3) Because supplying the notice specified in subsection (a) of this section imposes a substantial burden on laborers, subcontractors, service providers, and material suppliers, the notice requirement mandated under subsection (a) of this section as a condition precedent

to the imposition of a lien by a laborer, subcontractor, service provider, or material supplier shall apply only to construction of or improvement to residential real estate containing four (4) or fewer units.

(4) No subcontractor, service provider, material supplier, or laborer shall be entitled to a lien upon commercial real estate unless the subcontractor, service provider, material supplier, or laborer notifies the owner of the commercial real estate being constructed or improved, the owner's authorized agent, or the owner's registered agent in writing that the subcontractor, service provider, material supplier, or laborer is currently entitled to payment but has not been paid.

(5)(A) The notice shall be sent to the owner, the owner's authorized agent, or the owner's registered agent and to the contractor before seventy-five (75) days have elapsed from the time that the labor was supplied or the materials furnished.

(B) The notice may be served by any:

(i) Officer authorized by law to serve process in civil actions;

(ii) Form of mail addressed to the person to be served with a return receipt requested and delivery restricted to the addressee or the agent of the addressee; or

(iii) Means that provides written, third-party verification of delivery at any place where the owner, the owner's registered agent, or the owner's authorized agent maintains an office, conducts business, or resides.

(C) When served by mail, the notice shall be complete when mailed.

(D) If delivery of the mailed notice is refused by the addressee or the item is unclaimed:

(i) The lien claimant shall immediately send the owner, the owner's authorized agent, or the owner's registered agent a copy of the notice by first class mail; and

(ii) The unopened original of the item marked unclaimed or refused by the United States Postal Service shall be accepted as proof of service as of the postmarked date of the item.

(6) The notice shall contain the following information:

(A) A general description of the labor, service, or materials furnished, and the amount due and unpaid;

(B) The name and address of the person furnishing the labor, service, or materials;

(C) The name of the person who contracted for purchase of the labor, service, or materials;

(D) A description of the job site sufficient for identification; and

(E) The following statement set out in boldface type and all capital letters:

"NOTICE TO PROPERTY OWNER

**IF BILLS FOR LABOR, SERVICES, OR MATERIALS USED
TO CONSTRUCT OR PROVIDE SERVICES FOR AN IM-**

PROVEMENT TO REAL ESTATE ARE NOT PAID IN FULL, A CONSTRUCTION LIEN MAY BE PLACED AGAINST THE PROPERTY. THIS COULD RESULT IN THE LOSS, THROUGH FORECLOSURE PROCEEDINGS, OF ALL OR PART OF YOUR REAL ESTATE BEING IMPROVED. THIS MAY OCCUR EVEN THOUGH YOU HAVE PAID YOUR CONTRACTOR IN FULL. YOU MAY WISH TO PROTECT YOURSELF AGAINST THIS CONSEQUENCE BY PAYING THE ABOVE NAMED PROVIDER OF LABOR, SERVICES, OR MATERIALS DIRECTLY, OR MAKING YOUR CHECK PAYABLE TO THE ABOVE NAMED PROVIDER AND CONTRACTOR JOINTLY."

History. Acts 1979, No. 746, §§ 1-5; 1981, No. 669, § 1; 1983, No. 304, § 1; A.S.A. 1947, §§ 51-608.1 — 51-608.6; Acts 1995, No. 1298, § 7; 2005, No. 1994, § 98; 2005, No. 2287, § 3; 2009, No. 454, § 3; 2011, No. 271, § 5.

Amendments. The 2011 amendment substituted "suppliers" for "supplies" in (a)(5)(B)(i).

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CASE NOTES

ANALYSIS

Constitutionality.

Applicability.

Exception.

Noncompliance.

Strict Compliance.

Subcontractor.

Timing of Notice.

Constitutionality.

This section does not unconstitutionally impair vested rights under contract, and one has to give notice after the effective date of this section in order to perfect a lien. *Ellison v. Tubb*, 295 Ark. 312, 749 S.W.2d 650 (1988) (decision under prior law).

Homeowners had standing to challenge the constitutionality of this section. *Urrey*

Ceramic Tile Co. v. Mosley, 304 Ark. 711, 805 S.W.2d 54 (1991).

Subsection (f), exempting certain licensed contractors from giving notice to owners, is unconstitutional as violative of due process and equal protection. *Urrey Ceramic Tile Co. v. Mosley*, 304 Ark. 711, 805 S.W.2d 54 (1991).

Applicability.

Labor is not included in the required notice provisions of this section. *Gipson v. Tyson Foods, Inc.*, 272 Ark. 485, 615 S.W.2d 363 (1981).

As the construction was performed by the general contractor, a licensed contractor, who used an unlicensed contractor, the commercial construction exception still applied and the materialmen's lien was therefore enforceable and did not fail

for lack of notice. *Seyller v. Pierce & Co.*, 306 Ark. 474, 816 S.W.2d 577 (1991) (decision under prior law).

Exception.

Evidence held sufficient to find that exception to the notice requirement applied. *National Lumber Co. v. Advance Dev. Corp.*, 293 Ark. 1, 732 S.W.2d 840 (1987).

Noncompliance.

Supplier held not entitled to lien against homeowners for the value of the materials supplied where neither the supplier nor the contractor had given the homeowners the notice required under this section. *Gunter Bros. Lumber Co. v. Launius*, 11 Ark. App. 191, 669 S.W.2d 205 (1984).

Where no notice was ever given to the owner of the leasehold or to its authorized agent of the work done in drilling for oil, the liens were not properly perfected. *Dews v. Halliburton Indus., Inc.*, 288 Ark. 532, 708 S.W.2d 67 (1986).

The fact that the partnership did not follow the provisions of § 14-56-417 and city ordinances in dividing property into tracts is of no consequence and does not defeat the priority of the construction mortgages on each tract. *National Lumber Co. v. Advance Dev. Corp.*, 293 Ark. 1, 732 S.W.2d 840 (1987).

A supplier is not entitled to an engineer's lien under § 18-44-105, where the services were not done by a licensed engineer, and where notice under this section was not given. *Westside Galvanizing Servs., Inc. v. Georgia-Pacific Corp.*, 724 F. Supp. 644 (W.D. Ark. 1989), *aff'd*, 921 F.2d 735 (8th Cir. 1990).

Where property owner did not receive prescribed notice prior to the furnishing of materials, lien was not perfected although supplier filed lawsuit within 120 days of the last delivery of materials. *Westside Galvanizing Services, Inc. v. Georgia-Pacific Corp.*, 921 F.2d 735 (8th Cir. 1990).

General contractor was not entitled to a lien because it failed to comply with statutory provisions to notify the owner of the commercial real estate before 75 days had elapsed from the time that the labor was supplied and the material furnished; the contractor's certified letter to the owner to transmit the lien was not timely and the purported notice failed to satisfy the re-

quirements of this section. *Cannon Remodeling & Painting, Inc. v. Mktg. Co.*, 79 Ark. App. 432, 90 S.W.3d 5 (2002).

Strict Compliance.

The notice provisions contained in the statute are to be strictly construed, thus requiring strict compliance; they cannot be satisfied by substantial compliance. *Books-A-Million, Inc. v. Cockerman Constr. Co.*, 340 Ark. 467, 10 S.W.3d 857 (2000).

Subcontractor did not acquire a mechanic's and materialman's lien on a home because neither the subcontractor nor the contractor gave the homeowner the notice required by this section, which had to be strictly complied with, notwithstanding that the subcontractor provided the notice required by § 18-44-114(a). *Bryant v. Jim Atkinson Tile*, 100 Ark. App. 408, 269 S.W.3d 383 (2007).

Lien notice did not comply with this section, because strict compliance with the notice requirements of this section was required, and the description of work done simply tracked the language of the section, and in no way actually described the labor and materials provided by the claimant; the claimant merely stated that the lien notice was being provided in connection with sums owed and unpaid for labor and materials provided in connection with the properties. *Ground Zero Constr., Inc. v. Creek*, 2012 Ark. 243, 410 S.W.3d 579 (2012).

There is no qualifying language in this section that invalidates a mechanics' lien claim if the amount sought in a 75-day notice includes amounts for profits, which are not lienable; whether the amount stated in the notice can be proved at trial is not a requirement when determining strict compliance. The merits of whether the entire stated amount due and unpaid in the notice is lienable is an issue of proof to be decided by the trier of fact at trial, rather than through a motion to dismiss for failure to state a claim. *Ahern Rentals, Inc. v. Salter Constr., Inc.*, 2014 Ark. App. 423, 439 S.W.3d 699 (2014).

In a lien case, a notice provided by a supplier strictly complied with this section because it expressly provided that the lien amount being sought was for rental equipment that was provided for a particular subcontractor; this was a sufficient general description of the labor, service, or

materials provided. *Ahern Rentals, Inc. v. Salter Constr., Inc.*, 2014 Ark. App. 423, 439 S.W.3d 699 (2014).

Supplier of rental equipment strictly complied with the requirements in the statute by providing an amount due and unpaid, even if the initial amount in the notice was ultimately for more than it could have proven as lienable. *Ahern Rentals, Inc. v. Salter Constr., Inc.*, 2014 Ark. App. 423, 439 S.W.3d 699 (2014).

Subcontractor.

Subdivision (b)(1)(B) of this section protects a subcontractor from the contractor who fails to give notice. The distinction between contractors and subcontractors in subdivision (b)(1)(B) of this section is that the contractor has a legal duty to serve the notice before the work is commenced, while the subcontractor may serve the notice. *Bryant v. Cadena Contr., Inc.*, 100 Ark. App. 377, 269 S.W.3d 378 (2007).

Timing of Notice.

"Important notice to owner" under this section must be given by either a contractor or subcontractor before the work is done in order for it to be of any practical value. Therefore, a trial court erred by finding that there was a valid mechanics' lien against real property based on the fact that a subcontractor was not paid for framing since the subcontractor had not delivered the notice personally or by certified mail until after the work was completed. *Bryant v. Cadena Contr., Inc.*, 100 Ark. App. 377, 269 S.W.3d 378 (2007).

Cited: *South Cent. Dist. of Pentecostal Church of God of Am., Inc. v. Bruce-Rogers Co.*, 269 Ark. 130, 599 S.W.2d 702 (1980); *Duncan v. Davis & Earnest, Inc.*, 285 Ark. 143, 685 S.W.2d 509 (1985); *Johnson v. Southern Elec., Inc.*, 29 Ark. App. 160, 779 S.W.2d 190 (1989); *Land O'Frost, Inc. v. Pledger*, 308 Ark. 208, 823 S.W.2d 887 (1992); *Hall Contr. Corp. v. Entergy Servs.*, 309 F.3d 468 (8th Cir. 2002).

18-44-116. Service on nonresident or absconder.

(a)(1) Whenever property is sought to be charged with a lien under this subchapter, the notice may be filed with the recorder of deeds of the county in which the property is situated if the owner of the property so sought to be charged:

(A) Is not a resident of this state;

(B) Does not have an agent in the county in which the property is situated;

(C) Is a resident of this state but not of the county in which the property is situated; or

(D) Conceals himself or herself, has absconded, or absents himself or herself from his or her usual place of abode, so that the notice required by § 18-44-114 or § 18-44-115 cannot be served upon him or her.

(2) When filed, the notice shall have like effect as if served upon the owner or his or her agent in the manner contemplated in § 18-44-114 or § 18-44-115.

(b) A copy of the notice so filed, together with the certificate of the recorder of deeds that it is a correct copy of the notice so filed, shall be received in all courts of this state as evidence of the service, as provided in this section, of the notice.

(c)(1) The recorder of deeds in each county of this state shall receive, file, and keep every such notice presented to him or her for filing and shall further record it at length in a separate book appropriately entitled.

(2) For service so performed, the recorder of deeds shall receive for each notice, the sum of twenty-five cents (25¢), and for each copy

certified, as stated in this section, of each of the notices he or she shall receive the sum of fifty cents (50¢), to be paid by the party so filing or procuring the certified copy, as the case may be.

(d) The costs of filing and of one (1) certified copy shall be taxed as costs in any lien suit to which it pertains to abide the result of the suit.

History. Acts 1895, No. 146, § 7, p. § 8877; A.S.A. 1947, § 51-609; Acts 2009, 217; C. & M. Dig., § 6918; Pope's Dig., No. 454, § 3.

CASE NOTES

ANALYSIS

Agent of Owner.
Substantial Compliance.

Agent of Owner.

Notice filed in the office of the circuit clerk and recorder was held proper against contention that owner had an agent in the county. *Ellis v. Fayetteville*

Lumber & Cement Co., 195 Ark. 385, 112 S.W.2d 613 (1938).

Substantial Compliance.

Statute relating to filing of notice must be substantially complied with. *Ellis v. Fayetteville Lumber & Cement Co.*, 195 Ark. 385, 112 S.W.2d 613 (1938).

Cited: *Shannon Supply Co. v. Avey*, 240 Ark. 997, 403 S.W.2d 87 (1966).

18-44-117. Filing of lien.

(a)(1) It shall be the duty of every person who wishes to avail himself or herself of the provisions of this subchapter to file with the clerk of the circuit court of the county in which the building, erection, or other improvement to be charged with the lien is situated and within one hundred twenty (120) days after the things specified in this subchapter shall have been furnished or the work or labor done or performed:

(A) A just and true account of the demand due or owing to him or her after allowing all credits; and

(B) An affidavit of notice attached to the lien account.

(2) The lien account shall contain a correct description of the property to be charged with the lien, verified by affidavit.

(3) The affidavit of notice shall contain:

(A) A sworn statement evidencing compliance with the applicable notice provisions of §§ 18-44-114 — 18-44-116; and

(B) A copy of each applicable notice given under §§ 18-44-114 — 18-44-116.

(b)(1)(A) It shall be the duty of the clerk of the circuit court to endorse upon every account the date of its filing and to make an abstract of the account in a book kept by him or her for that purpose, properly indexed.

(B) This abstract shall contain:

(i) The date of the filing;

(ii) The name of the person laying or imposing the lien;

(iii) The amount of the lien;

(iv) The name of the person against whose property the lien is filed; and

(v) A description of the property to be charged with the lien.

(2) For this service, the clerk shall receive the sum of three dollars (\$3.00) from the person laying or imposing the lien, which shall be taxed and collected as other costs in case there is suit on the lien.

(3) The clerk shall refuse to file a lien account that does not contain the affidavits and attachments required by this section.

History. Acts 1895, No. 146, §§ 11, 12, p. 217; C. & M. Dig., §§ 6922, 6923; Pope's Dig., §§ 8881, 8882; Acts 1945, No. 55, § 2; 1961, No. 239, § 1; 1963, No. 124, § 1; 1977, No. 333, § 3; A.S.A. 1947,

§§ 12-1720, 51-613, 51-614; Acts 2005, No. 2287, § 1; 2007, No. 810, § 1; 2009, No. 454, § 3.

Cross References. Uniform fees for recorders, §§ 16-65-117, 21-6-101.

RESEARCH REFERENCES

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Construction Contracts, 58 Ark. L. Rev. 353.

CASE NOTES

ANALYSIS

Affidavits.
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—Effect of Noncompliance.
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—Open Account.
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Place of Filing.
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Affidavits.

The making and filing of the affidavit are essential to the validity of a lien. *Rasmussen v. C.J. Horner Co.*, 255 Ark. 1030, 505 S.W.2d 225 (1974).

Where lienor filed a lien account without verification by oath or affirmation, he failed to make the affidavit required for validity of the lien. *Rasmussen v. C.J. Horner Co.*, 255 Ark. 1030, 505 S.W.2d 225 (1974).

Appeal.

The objection that there was no proof that the lien was claimed in the manner prescribed cannot be raised for the first time on appeal. *Roseburr v. McDaniel*, 147 Ark. 203, 227 S.W. 397 (1921).

Owner could not complain on appeal that the claim was not filed in the time prescribed where the issue was not raised by the pleadings nor at the trial. *Judd v. Rieff*, 174 Ark. 362, 295 S.W. 370 (1927).

Bankruptcy.

Where claimants in bankruptcy furnished labor and material to bankrupt prior to filing date of bankruptcy, and mechanics' liens were recorded by the claimants prior to such date, such liens were perfected prior to date of bankruptcy and allowable claims. *In re Taylor Oak Flooring Co.*, 87 F. Supp. 6 (W.D. Ark. 1949).

Where creditor floor repair company filed a verified complaint with the circuit court within 120 days of the performance of its contract with the bankruptcy debtors, it complied with this section and had a valid lien; the lien was preserved under the Bankruptcy Code, and the creditor was permitted post-petition perfection of the lien. *In re McCord*, 219 B.R. 251 (Bankr. E.D. Ark. 1998).

Commencement of Action.

If action was begun within statutory period, there was no necessity to file any account other than that which accompanied the complaint. *Anderson v. Seamans*, 49 Ark. 475, 5 S.W. 799 (1887) (decision under prior law) *National Lumber Co. v. Advance Dev. Corp.*, 293 Ark. 1, 732 S.W.2d 840 (1987).

Where the complaint is verified by one of the plaintiffs, and the action is brought

within statutory period, there is no necessity of having a "just and true account" other than a general statement in the complaint. *Wood v. King Mfg. Co.*, 57 Ark. 284, 21 S.W. 471 (1893). See also *McFadden v. Stark*, 58 Ark. 7, 22 S.W. 884 (1893) (preceding decisions under prior law).

When suit is brought within the statutory period, there is no necessity, between the lienholder and landowner, to file any account other than the one accompanying the complaint, nor to enter any abstract of the particulars in the mechanic's lien book. *Pfeiffer Stone Co. v. Brogdon*, 125 Ark. 426, 188 S.W. 1187 (1916); *Carr v. Hahn & Carter*, 133 Ark. 401, 202 S.W. 685 (1918); *Rea v. Lammers*, 212 Ark. 792, 207 S.W.2d 740 (1948).

It is unnecessary for a lienholder to give notice of its lien to the landowner if suit to enforce the lien is brought within statutory period from date of last item appearing on the account. *Robins v. East Arkansas Builders Supply Co.*, 199 Ark. 1174, 199 Ark. 1174, 137 S.W.2d 924 (1940).

Complaint filed to recover amount due on contract without asserting lien was not a suit under this section and a "motion to enforce lien" filed later than statutorily allowed period after the material was furnished or labor done was too late. *Rea v. Lammers*, 212 Ark. 792, 207 S.W.2d 740 (1948).

Where suit on mechanic's lien was filed well within the statutory period from the furnishing of the last items of labor and material, even if there was no compliance with this section, such failure to comply would be no defense. *Plant v. Cameron Feed Mills, Inc.*, 228 Ark. 607, 309 S.W.2d 312 (1958).

It would not be necessary for claimant to comply with either § 18-44-101 creating a lien in favor of the party or § 18-44-114 whereby he could have given notice if he commenced a suit against the necessary parties within the statutory period after the last item was furnished. *Burks v. Sims*, 230 Ark. 170, 321 S.W.2d 767 (1959).

Where the court permitted an intervention claiming a lien, the filing of this pleading obviated the necessity of complying with the provisions of this section as to filing claim for lien. *Schulte v. Walthour*, 239 Ark. 627, 393 S.W.2d 242 (1965).

A suit to establish a lien is a substantial compliance with this section, if filed

against the necessary parties within the statutory period, and cures the omission to file the account with the circuit court clerk, but this relaxation of the statutory requirement applies only as between the lien claimant and the landowner, and failure to file the required statement will not be excused in the case of a mortgagee against whom a suit is not instituted within the statutory period. *Wiggins v. Searcy Fed. Sav. & Loan Ass'n*, 253 Ark. 407, 486 S.W.2d 900 (1972).

Where contractor brought a timely suit against landowner to establish lien within statutory period but did not join the bank, whose mortgage was executed subsequent to the commencement of the improvement, and contractor additionally failed to file the notice required by this section and did not file any pleading asserting priority over bank's mortgage until after the statutory period had elapsed, contractor's lien was subordinate to the mortgage of the bank. *Wiggins v. Searcy Fed. Sav. & Loan Ass'n*, 253 Ark. 407, 486 S.W.2d 900 (1972).

When computing the time within which a suit in a civil proceeding has to be filed in order to perfect and enforce a lien, this section does not provide that a certain method or procedure be used; therefore, the use of ARCP 6(a) is not excluded by ARCP 81(a). *Transportation Properties, Inc. v. Central Glass & Mirror of N.W. Ark., Inc.*, 38 Ark. App. 60, 827 S.W.2d 667 (1992).

Compliance Generally.

This section must be substantially complied with. *Conway Lumber Co. v. Hardin*, 119 Ark. 43, 177 S.W. 408 (1915).

Materialmen who complied with this section were entitled to have liens declared in their favor, though they did not pray for it, but sought relief on the contractor's bond on the assumption that it had displaced the liens. *Union Indem. Co. v. Covington*, 178 Ark. 533, 12 S.W.2d 884 (1928).

Where a materialman commences suit within statutory period after the materials were furnished to establish a lien, he is entitled to a lien, though he fails to verify his account, since a substantial compliance is all that is required. *Rust v. Kelley Bros. Lumber Co.*, 180 Ark. 517, 21 S.W.2d 973 (1929).

Compliance with this section is not sufficient to render a lien choate so as to give

it priority over subsequently established federal tax lien. *United States v. McGehee*, 237 Ark. 698, 375 S.W.2d 365 (1964).

—Effect of Noncompliance.

A mechanic's lien not filed within statutory period is void. *Mitchell v. Schulte*, 142 Ark. 446, 222 S.W. 365 (1920); *National Lumber Co. v. Advance Dev. Corp.*, 293 Ark. 1, 732 S.W.2d 840 (1987).

Failure to file claims with the clerk of the circuit court within statutory period was fatal to the enforcement of liens for labor unless action was brought within that period. *Hirsch v. Farris*, 174 Ark. 1040, 298 S.W. 487 (1927).

Claimant who did not file any lien against property in accordance with the law, though entitled to personal judgment, was not entitled to a lien on the property. *McGehee Realty & Lumber Co. v. Kennedy*, 200 Ark. 926, 141 S.W.2d 524 (1940).

Where no lien notice was filed and no suit brought within the statutory period after completion of work, additional work which amounted to nothing more than servicing machinery and fixtures already installed, did not extend the lien period. *Turner-McCoy, Inc. v. Hardy*, 230 Ark. 410, 323 S.W.2d 562 (1959).

Where materialman seeking to enforce lien elected to proceed by filing suit within the statutory period provided in this section against the property owner rather than filing a proper action with the clerk within the statutory period provided in this section as required by this section, he had the statutory period provided in this section and not period provided under § 18-44-119 in which to amend his pleadings to make the proper contractor a party, inasmuch as the claimant is not entitled to the extension provided under § 18-44-119 to bring suit until he has perfected his lien by filing a proper action with the clerk. *B.S.C., Inc. v. McKinney*, 263 Ark. 110, 562 S.W.2d 600 (1978).

Contents of Account.

It is not necessary that a claimant file an itemized account in order to make the lien effectual. *Terry v. Klein*, 133 Ark. 366, 201 S.W. 801 (1918).

An affidavit made by claimant's bookkeeper is sufficient. *Georgia State Sav. Ass'n v. Marrs*, 178 Ark. 18, 9 S.W.2d 785 (1928).

Nothing requires a materialman to file an itemized account of the demand due;

there is substantial compliance if the total is provided and the invoices introduced in evidence at trial. *John E. Bryant & Sons Lumber Co. v. Moore*, 264 Ark. 666, 573 S.W.2d 632 (1978).

Description of Property.

The claim for a lien filed must describe some particular tract or acre of land on which the building is situated, or the particular building or buildings upon which it is sought to establish a lien. *Arkmo Lumber Co. v. Cantrell*, 159 Ark. 445, 252 S.W. 901 (1923).

Incorrect description did not invalidate the lien, since it was not misleading. *Ferguson Lumber Co. v. Scriber*, 162 Ark. 349, 258 S.W. 353 (1924).

A verified claim and account is sufficient if it describes the premises so that a person of ordinary understanding can identify them and the structure into which the materials were placed can be found and identified. *Brown v. Turnage Hdwe. Co.*, 181 Ark. 606, 26 S.W.2d 1114 (1930).

Affidavits for a materialman's lien describing the property as a building situated on a certain block were sufficient. *Geisreiter v. Standard Lumber Co.*, 187 Ark. 893, 63 S.W.2d 347 (1933).

It is sufficient, if property to be charged is described with sufficient certainty so that land can be reasonably identified. In *re Taylor Oak Flooring Co.*, 87 F. Supp. 6 (W.D. Ark. 1949).

Holders of mechanics' liens were held to have preferred claims in bankruptcy, where statements of liens recorded designated property to be charged as property of the bankrupt, though descriptions of lot numbers were not included in the statements, as property of bankrupt was located in one section of the town known to everyone in the town. In *re Taylor Oak Flooring Co.*, 87 F. Supp. 6 (W.D. Ark. 1949).

Where description filed with account did not properly describe the land intended to be affected, a lien is not perfected. *Speights v. Arkansas Sav. & Loan Ass'n*, 239 Ark. 587, 393 S.W.2d 228 (1965).

The description need not be in any particular form; the essential requirement is that the land or building be designated in such language as will afford information concerning the situation of the property to

be charged with the lien. *Arkholia Sand & Gravel Co. v. Hutchinson*, 291 Ark. 570, 726 S.W.2d 674 (1987).

Extrinsic evidence may be used to show that the description is adequate. *Arkholia Sand & Gravel Co. v. Hutchinson*, 291 Ark. 570, 726 S.W.2d 674 (1987).

Description of property held insufficient. *Arkholia Sand & Gravel Co. v. Hutchinson*, 291 Ark. 570, 726 S.W.2d 674 (1987).

The property description must be sufficient to enable anyone familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others. *Westside Galvanizing Servs., Inc. v. Georgia-Pacific Corp.*, 724 F. Supp. 644 (W.D. Ark. 1989), *aff'd*, 921 F.2d 735 (8th Cir. 1990).

Description was sufficient to enable a person with a reasonable amount of extrinsic evidence to locate the improvement in question, where description directed reader to mailbox located within eyesight of improvement, which layperson would be able to locate more easily and with less reference to extrinsic evidence than if the correct legal description were used, improvement was largest metal building in the locality, was the only property owned by the debtor in that area, and the only piece of property which reasonably answered the description provided. In re *Horton Vaults, Inc.*, 109 B.R. 356 (Bankr. E.D. Ark. 1989).

Exceptions.

There are two exceptions to this section, one, where the items were furnished under a definite contract between the parties, and the other where the items were furnished under a "running" or open account without a specific contract, but under a reasonable assumption that further material would be furnished. *Streuli v. Wallin-Dickey & Rich Lumber Co.*, 227 Ark. 885, 302 S.W.2d 522 (1957).

—Open Account.

The fact that material furnished during the required statutory period preceding the filing of the lien was not used in constructing the defendant's home did not preclude the enforcement of a materialman's lien for the entire account where all the material was furnished under a continuous account and was used to improve the land. *McCann v. Dyke*, 187 Ark. 507, 60 S.W.2d 918 (1933).

Where there was no evidence to show that improvements made several months later than original ones were contemplated at the time of the original purchases, the materialman filing his lien within the statutory period after the last purchase obtained a lien only for that purchase, not for the previous purchases. *Streuli v. Wallin-Dickey & Rich Lumber Co.*, 227 Ark. 885, 302 S.W.2d 522 (1957).

Miner's Liens.

Claimant seeking to impress lien under § 18-44-202 must show he filed the affidavit provided by this section within the statutory period after the work was "in good faith performed" as provided by § 18-44-208. *Smith v. Grandbush*, 233 Ark. 806, 348 S.W.2d 880 (1961).

Necessary Parties.

Where a construction company filed an action to enforce a mechanic's lien against the landowner and the general contractor on the 114th day after the completion of the construction company's work, but the construction company did not join the subcontractor as a party defendant until the 123rd day, and the construction company admitted that its contract of employment was only with the subcontractor, the trial court properly dismissed the action for failure to join a necessary party, the subcontractor, within the time allowed. *Cline v. B.G. Coney Co.*, 289 Ark. 417, 711 S.W.2d 815 (1986).

Place of Filing.

Where the notice of a claim against real estate was given in the county where the property was located but the claim itself was filed in a different county, such filing was not in compliance with this section and the land could not be sold to satisfy the claim. *Cone v. Jurczyk*, 261 Ark. 251, 547 S.W.2d 108 (1977).

Pleading.

Where the complaint alleged a compliance with this section, and the allegation was not denied in the answer, compliance was confessed although the evidence did not show notice of intention to file as required by this section and § 18-44-114. *Jones v. J.C. Stephenson Lumber Co.*, 149 Ark. 670, 234 S.W. 263 (1921).

Complaint for materialman's lien which alleged that the last item had been furnished within statutory period before

claim was filed was sufficient to state a cause of action. *Phelps-Powell Bldg. Supply Co. v. Silver Dollar Homes, Inc.*, 241 Ark. 425, 407 S.W.2d 925 (1966).

Relation Back.

When lien was filed, it related back to the time of supplying the machinery, and was superior to intervening encumbrances. *White v. Chaffin*, 32 Ark. 59 (1877) (decision under prior law).

Workman's mechanic's lien filed in time would be superior to intervening encumbrances and conveyances since the filing of the lien relates back to the time of the work. *Franks v. Wood*, 217 Ark. 10, 228 S.W.2d 480 (1950).

Mortgagee did not defeat the priority of liens of subsequent materialmen who furnished materials after the recording of the construction money mortgage by paying materialman who furnished materials prior to the recording of the mortgage, since the liens of the subsequent materialmen related back to commencement of construction of the home and were on an equality with that of the first materialman. *Planters Lumber Co. v. Jack Collier E. Co.*, 234 Ark. 1091, 356 S.W.2d 631 (1962).

A lien relates back to the commencement of the construction when the lienor's account is filed with the circuit clerk as required by this section, but the filing of the account is essential to the perfection of the lien and its continued existence after the expiration of the statutory period allowed for filing, and in the absence of substantial compliance with this section the lien would become void and unenforceable when the statutory period for filing the lien expires. *Wiggins v. Searcy Fed. Sav. & Loan Ass'n*, 253 Ark. 407, 486 S.W.2d 900 (1972).

When the materialman claiming a lien files his account with the circuit clerk, his lien dates back to the commencement of the building and is superior to any lien on the property that may have been placed there subsequent to the commencement of the building, and in order for a construction money mortgage to have priority, it must have been executed before the commencement of the building. *Bank of Cave City v. Hill*, 266 Ark. 727, 587 S.W.2d 833 (1979).

A suit under the materialman's lien law must be based upon an account properly

filed in the circuit clerk's office and be brought to enforce the lien established by that filing; such a suit relates back to the furnishing of the material. *Lowe's of Ark., Inc. v. Bush*, 282 Ark. 508, 669 S.W.2d 198 (1984).

Although a materialman's lien was considered to relate back to the date on which the particular material was furnished, a materials supplier that filed a materialman's lien on property after a bank had filed a foreclosure complaint and a lis pendens on the same property was subject to the lis pendens because the supplier did not obtain an interest in the property prior to the filing of the lis pendens. *Nat'l Home Ctrs., Inc. v. Coleman*, 373 Ark. 246, 283 S.W.3d 218 (2008).

Time for Filing.

If materials were furnished under one contract, the account should have been filed within statutory period after the last item was delivered; but if they were furnished under separate contracts, the account should have been filed under each contract within the time allowed. *Kizer Lumber Co. v. Mosely*, 56 Ark. 544, 20 S.W. 409 (1892) (decision under prior law); *American Tank Co. v. Continental & Commercial Trust & Sav. Bank*, 3 F.2d 122 (8th Cir. 1924).

Where items of an account on which a mechanic's lien was sought were furnished from time to time under a single contract, it was sufficient if the claim was filed within the statutory period after the last item was furnished. *Hill v. Imboden*, 146 Ark. 99, 225 S.W. 330 (1920); *Ferguson Lumber Co. v. Scriber*, 162 Ark. 349, 258 S.W. 353 (1924); *Whitener v. Purifoy*, 177 Ark. 39, 5 S.W.2d 724 (1928).

Filing held timely. *Standard Lumber Co. v. Wilson*, 173 Ark. 1024, 296 S.W. 27 (1927).

Filing held untimely. *Smith v. Grandbush*, 233 Ark. 806, 348 S.W.2d 880 (1961).

Recalibration of equipment amounted to an adjustment of equipment already installed and did not extend the period for filing materialmen's lien account beyond the date of last delivery nor for work done beyond the date of actual installation. *Arkansas La. Gas Co. v. Moffitt*, 245 Ark. 992, 436 S.W.2d 91 (1969).

Trial court did not err in granting contractor's motion to dismiss subcontractor's

action, based on a forum selection clause, and in dismissing subcontractor's unjust enrichment claim against property developer because subcontractor's lien was untimely under the 120-day time limit provided in this section and, thus, the lien was not perfected and the complaint could not have been an in rem action; further, once the contractor posted a bond pursuant to § 18-44-118, the lien had been discharged. *Servewell Plumbing, LLC v. Summit Contrs., Inc.*, 362 Ark. 598, 210 S.W.3d 101 (2005).

Materialman's lien on barges was not untimely under subdivision (a)(1) of this section, as a shipment of steel made within the 120-day period was properly found to have been furnished on the barge builder's existing credit account; the district court credited testimony showing that the final delivery was not a one-time, prepaid shipment. *Falcon Steel, Inc. v. J. Russell Flowers, Inc.*, 635 F.3d 369 (8th Cir. 2011).

Cited: *Doke v. Benton County Lumber Co.*, 114 Ark. 1, 169 S.W. 327 (1914); *Young Men's Bldg. Ass'n v. Ware*, 158 Ark.

137, 249 S.W. 545 (1923); *Robins v. East Arkansas Builders Supply Co.*, 199 Ark. 1174, 199 Ark. 1174, 137 S.W.2d 924 (1940); *Wyatt Lumber & Supply Co. v. Hansen*, 201 Ark. 534, 147 S.W.2d 366 (1940); *Terrell v. Loomis*, 218 Ark. 296, 235 S.W.2d 961 (1951); *Lyman Lamb Co. v. Union Bank*, 237 Ark. 629, 374 S.W.2d 820 (1964); *Stone Mill & Lumber Co. v. Finsterwalder*, 249 Ark. 363, 459 S.W.2d 117 (1970); *South Cent. Dist. of Pentecostal Church of God of Am., Inc. v. Bruce-Rogers Co.*, 269 Ark. 130, 599 S.W.2d 702 (1980); *John E. Bryant & Sons Lumber Co. v. Moore*, 270 Ark. 933, 606 S.W.2d 617 (1980); *Calton Properties, Inc. v. Ken's Dist. Bldg. Materials, Inc.*, 282 Ark. 521, 669 S.W.2d 469 (1984); *American Nat'l Bank v. Dux*, 286 Ark. 309, 691 S.W.2d 851 (1985); *Ellison v. Tubb*, 295 Ark. 312, 749 S.W.2d 650 (1988); *Buckman v. Gay*, 27 Ark. App. 184, 768 S.W.2d 547 (1989); *Westside Galvanizing Services, Inc. v. Georgia-Pacific Corp.*, 921 F.2d 735 (8th Cir. 1990); *Hall Contr. Corp. v. Entergy Servs.*, 309 F.3d 468 (8th Cir. 2002).

18-44-118. Filing of bond in contest of lien.

(a)(1) In the event any person claiming a lien for labor or materials upon any property shall file such a lien within the time and in the manner required by law with the circuit clerk or other officer provided by law for the filing of such a lien, and if the owner of the property, any mortgagee or other person having an interest in the property, or any contractor, subcontractor, or other person liable for the payment of such a lien shall desire to contest the lien, then the person so desiring to contest the lien may file:

(A) With the circuit clerk or other officer with whom the lien is filed as required by law a bond with surety, to be approved by the officer in the amount of the lien claimed; or

(B) An action under subsection (f) of this section to protest the filing of the lien.

(2) The bond shall be conditioned for the payment of the amount of the lien, or so much of the lien as may be established by suit, together with interest and the costs of the action, if upon trial it shall be found that the property was subject to the lien.

(b)(1)(A) Upon the filing of the bond, if the circuit clerk or other officer before whom it is filed approves the surety, he or she shall give to the person claiming the lien, at his or her last known address, three (3) days' notice of the filing of the bond.

(B) The notice shall be in writing and served by any:

(i) Officer authorized by law to serve process in a civil action; or

(ii) Form of mail addressed to the person to be served with a return receipt requested and delivery restricted to the addressee or the agent of the addressee.

(2)(A) Within the three (3) days' notice, the person claiming the lien may appear and question the sufficiency of the surety or form of the bond.

(B) At the expiration of three (3) days, if the person claiming the lien shall not have questioned the sufficiency of the bond or surety or if the circuit clerk finds the bond to be sufficient, the circuit clerk shall note the filing of the bond upon the margin of the lien record and the lien shall then be discharged and the claimant shall have recourse only against the principal and surety upon the bond.

(c)(1) If no action to enforce the lien shall be filed within the time prescribed by law for the enforcement of a lien against the surety, the bond shall be null and void.

(2) However, if any action shall be timely commenced, the surety shall be liable in like manner as the principal.

(d) If the circuit clerk shall determine that the bond tendered is insufficient, the person tendering the bond shall have twenty-four (24) hours within which to tender a sufficient bond, and unless a sufficient bond shall be so tendered, the lien shall remain in full force and effect.

(e)(1) Any party aggrieved by the acceptance or rejection of the bond may apply to any court of competent jurisdiction by an action which is appropriate.

(2) Upon notice as required by law, the court shall have jurisdiction to enter an interlocutory order as may be necessary for the protection of the parties by:

(A) Requiring additional security for the bond;

(B) Reinstating the lien in default of the bond, pending trial and hearing; or

(C) Requiring acceptance of the bond as may be necessary for the protection of the parties.

(f)(1) A protest under subdivision (a)(1)(B) of this section shall be filed as a civil action in the circuit court of the county where the lien is filed.

(2) The issues in the action shall be limited to whether:

(A) The lien was filed in the form required by § 18-44-117; and

(B) All of the applicable requirements of §§ 18-44-114 and 18-44-115 were satisfied.

(3)(A) The summons shall be in customary form directed to the sheriff of the county in which the action is filed, with directions for service of the summons on the named defendants. In addition, the clerk of the circuit court shall issue and direct the sheriff to serve upon the named defendants a notice in the following form:

"NOTICE OF INTENTION TO DISCHARGE LIEN

You are hereby notified that the attached complaint in the above-styled cause claims that you have not satisfied the requirements for

claiming a lien upon the property described in the complaint and seeks to have the lien discharged by the court. If, within five (5) days, excluding Sundays and legal holidays, from the date of service of this notice, you have not filed in the office of the clerk of this court a written objection to the claims made against you by the plaintiff, then an order discharging the lien shall be issued immediately by the court. If you should file a written objection to the allegations of the complaint of the plaintiff within five (5) days, excluding Sundays and legal holidays, from the date of service of this notice, a hearing will be scheduled by the court to determine whether or not the lien should be discharged."

(B) If within five (5) days, excluding Sundays and legal holidays, following service of the summons, complaint, and notice the defendant or defendants have not filed a written objection to the claim of the plaintiff, the court shall immediately issue an order discharging the lien upon the property described in the complaint.

(C) If a written objection to the claim of the plaintiff is filed by the defendant or defendants within five (5) days from the date of service of the notice, summons, and complaint, the plaintiff shall obtain a date for the hearing of the plaintiff's complaint and shall give notice of the date, time, and place of the hearing to all defendants.

(4)(A) The action shall be heard as expeditiously as the business of the circuit court permits.

(B) Evidence may be presented by affidavit, subject to Rule 56(e),(f), and (g) of the Arkansas Rules of Civil Procedure.

(5) If the circuit court finds that the lien was not in the form required by § 18-44-117 or that the applicable requirements of §§ 18-44-114 and 18-44-115 were not satisfied, then the circuit court shall enter an order discharging the lien.

(6) The prevailing party shall be entitled to a reasonable attorney's fee and the costs of the protest.

(g) Nothing in this section shall be construed to limit the right of an owner, mortgagee, or any other person with an interest in the property to contest the lien by declaratory judgment proceedings under § 16-111-101 et seq.

History. Acts 1963, No. 66, § 2; A.S.A. 1947, § 51-641; Acts 2005, No. 2287, § 2; 2009, No. 454, § 3.

Cross References. Bonds generally, § 18-44-501 et seq.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey of Arkansas Law: Property, 4 U. Ark. Little Rock L.J. 233.

CASE NOTES

In General.

Trial court did not err in granting contractor's motion to dismiss subcontractor's action, based on a forum selection clause, and in dismissing subcontractor's unjust enrichment claim against property developer because subcontractor's lien was untimely under the 120-day time limit provided in § 18-44-117 and, thus, the lien was not perfected and the complaint could not have been an in rem action; further, once the contractor posted a bond pursuant to this section, the lien had been discharged. *Servewell Plumbing, LLC v. Summit Contrs., Inc.*, 362 Ark. 598, 210 S.W.3d 101 (2005).

Circuit court erred in denying a surety's motion for directed verdict because the

general contractor was not liable, and thus, the surety was not liable; the surety, by the bond, bound itself only to the performance of the acts that the general contractor had promised to perform as part of the subcontract, and because the owner did not pay the general contractor for the subcontractor's work, the general contractor, and the surety, were entitled to invoke the pay-if-paid clause as a defense. *Travelers Cas. & Sur. Co. of Am. v. Sweet's Contr., Inc.*, 2014 Ark. 484, 450 S.W.3d 229 (2014).

Cited: *House v. Scott*, 244 Ark. 1075, 429 S.W.2d 108 (1968); *Calton Properties, Inc. v. Ken's Dist. Bldg. Materials, Inc.*, 282 Ark. 521, 669 S.W.2d 469 (1984).

18-44-119. Limitation of actions.

(a) All actions under this subchapter shall be commenced within fifteen (15) months after filing the lien and prosecuted without unnecessary delay to final judgment.

(b) No lien shall continue to exist by virtue of the provisions of this subchapter for more than fifteen (15) months after the lien is filed, unless within that time:

- (1) An action shall be instituted as described in this subchapter; and
- (2) A *lis pendens* is filed under § 16-59-101 et seq.

History. Acts 1895, No. 146, § 15, p. 217; 1899, No. 182, § 1, p. 322; C. & M. Dig., § 6926; Pope's Dig., § 8888; A.S.A. 1947, § 51-616; Acts 2005, No. 2287, § 4.

CASE NOTES

ANALYSIS

Applicability.
Amendment of Complaint.
Bankruptcy.
Bringing in Proper Parties.
Consent Decrees.
Timeliness.

Applicability.

The limitation of actions of this section as made applicable to miners' liens by § 18-44-208 is applicable to a complaint under the miners' lien statute based on § 18-44-209. *Superior Iron Works & Supply Co. v. Saulsberry*, 226 Ark. 1032, 295 S.W.2d 626 (1956).

Amendment of Complaint.

An amendment of a complaint to give a more particular description of the land upon which a lien was sought was not commencement of a new action barred by limitation. *Arkansas Foundry Co. v. American Portland Cement Co.*, 189 Ark. 779, 75 S.W.2d 387 (1934).

Bankruptcy.

Limitations period for bringing action under § 18-44-209 was not suspended by bankruptcy of lienholder's vendee where suit was against third persons who allegedly converted the materials furnished the vendee. *Superior Iron Works & Supply Co. v. Saulsberry*, 226 Ark. 1032, 295 S.W.2d 626 (1956).

Bringing in Proper Parties.

The contractor is an indispensable party, and where contractor was not made a party within the statutory period, suit was barred notwithstanding suit had been brought against owner prior to that time. *St. Mathews Church v. White*, 172 Ark. 1152, 291 S.W. 977 (1927).

Although petitions to foreclose liens were timely filed against owners the joining of the contractor by leave of court after the statutory period had expired constituted a new cause of action which was barred. *Rasmussen v. Reed*, 255 Ark. 1064, 505 S.W.2d 222 (1974).

The tolling action of federal bankruptcy provision following a bankruptcy injunction, did not extend the period in which lien creditors could join the bankrupt contractor in a suit to foreclose mechanic's liens. *Rasmussen v. Reed*, 255 Ark. 1064, 505 S.W.2d 222 (1974).

Where materialman seeking to enforce lien elected to proceed by filing suit against the property owner rather than filing a proper action with the clerk as required by § 18-44-117, he had period provided in § 18-44-117 and not the period provided under this section in which to amend his pleadings to make the proper contractor a party, inasmuch as the claimant is not entitled to the time provided for in this section until he has perfected his lien by filing a proper action with the clerk. *B.S.C., Inc. v. McKinney*, 263 Ark. 110, 562 S.W.2d 600 (1978).

Consent Decrees.

The refusal to vacate a consent decree enforcing a materialman's lien because the suit was brought after the statutory period expired was proper because the decree operated as a bar to all defenses which could have been interposed in the former suit. *Blair v. Askew-Jones Lumber Co.*, 186 Ark. 687, 55 S.W.2d 78 (1932).

Timeliness.

Action held to be timely. *Ellis v. Fayetteville Lumber & Cement Co.*, 195 Ark. 385, 112 S.W.2d 613 (1938).

Action held barred by statute of limitation. *Superior Iron Works & Supply Co. v. Saulsberry*, 226 Ark. 1032, 295 S.W.2d 626 (1956); *Calton Properties, Inc. v. Ken's Dist. Bldg. Materials, Inc.*, 282 Ark. 521, 669 S.W.2d 469 (1984).

When computing the time within which a suit in a civil proceeding has to be filed in order to perfect and enforce a lien, § 18-44-117 does not provide that a certain method or procedure be used; therefore, the use of ARCP 6(a) is not excluded by ARCP 81(a). *Transportation Properties, Inc. v. Central Glass & Mirror of N.W. Ark., Inc.*, 38 Ark. App. 60, 827 S.W.2d 667 (1992).

Cited: *Doke v. Benton County Lumber Co.*, 114 Ark. 1, 169 S.W. 327 (1914); *Carr v. Hahn & Carter*, 133 Ark. 401, 202 S.W. 685 (1918); *John E. Bryant & Sons Lumber Co. v. Moore*, 264 Ark. 666, 573 S.W.2d 632 (1978); *Hall Contr. Corp. v. Entergy Servs.*, 309 F.3d 468 (8th Cir. 2002).

18-44-120, 18-44-121. [Repealed.]

Publisher's Notes. These sections, concerning jurisdiction to enforce liens and procedure generally, were repealed by Acts 1995, No. 1298, § 8. The sections were derived from the following sources:

18-44-120. Acts 1895, No. 146, § 17, p.

217; C. & M. Dig., § 6925; Pope's Dig., § 8887; A.S.A. 1947, § 51-615.

18-44-121. Acts 1895, No. 146, § 13, p. 217; C. & M. Dig., § 6927; Pope's Dig., § 8889; A.S.A. 1947, § 51-617. For present law, see § 16-13-304.

18-44-122. Contents of complaint.

The complaint, among other things, shall allege the facts necessary for securing a lien under this subchapter and shall contain a description of the property to be charged with the lien.

History. Acts 1895, No. 146, § 13, p. 217; C. & M. Dig., § 6927; Pope's Dig., § 8889; A.S.A. 1947, § 51-617; Acts 2009, No. 454, § 4.

Cross References. Description of property, § 18-44-117.

CASE NOTES

ANALYSIS

Complaint.

Description of Property.

Complaint.

A complaint to enforce a materialman's lien must allege the performance of all the acts necessary under the statute to secure them. *Chaffin v. McFadden*, 41 Ark. 42 (1883) (decision under prior law).

Description of Property.

The description need not be in any particular form; the essential requirement is that the land or building be designated in

such language as will afford information concerning the situation of the property to be charged with the lien. *Arkholia Sand & Gravel Co. v. Hutchinson*, 291 Ark. 570, 726 S.W.2d 674 (1987).

Extrinsic evidence may be used to show that the description is adequate. *Arkholia Sand & Gravel Co. v. Hutchinson*, 291 Ark. 570, 726 S.W.2d 674 (1987).

Description of property held insufficient. *Arkholia Sand & Gravel Co. v. Hutchinson*, 291 Ark. 570, 726 S.W.2d 674 (1987).

Cited: *Calton Properties, Inc. v. Ken's Dist. Bldg. Materials, Inc.*, 282 Ark. 521, 669 S.W.2d 469 (1984).

18-44-123. Parties to suits.

In all suits under this subchapter, the parties to the contract and all other persons interested in the controversy and in the property charged with the lien may be made parties to the suit. Those that are not made parties shall not be bound by the proceedings.

History. Acts 1895, No. 146, § 19, p. 217; C. & M. Dig., § 6928; Pope's Dig., § 8890; A.S.A. 1947, § 51-618.

CASE NOTES

ANALYSIS

Contractors.

Mortgagees.

Contractors.

In an action by a materialman against the owner of a building to have a lien declared and enforced on a building for the erection of which the material has been furnished, the original contractor is a necessary and indispensable party. *Cruce v. Mitchell*, 122 Ark. 141, 182 S.W. 530 (1916).

United States' motion to dismiss plaintiffs' claims for breach of contract and enforcement of its materialman's lien was granted in part because it had not waived its sovereign immunity, and thus, it had to be dismissed with prejudice from the action. However, dismissing the United States from the lawsuit did not necessar-

ily result in a dismissal of plaintiff's lien claims, as plaintiff was not required to make the United States, the owner and lessor of the subject property, a party to its lawsuit in order to perfect its lien interest and recover against defendant lessees' leasehold estate under this section. *Dennis Allen Constr. Co. v. Sec'y of Army Corps of Eng'rs*, No. 3:12-CV-03061, 2012 U.S. Dist. LEXIS 107966 (W.D. Ark. Aug. 2, 2012).

Mortgagees.

Where plaintiff in suit seeking to establish lien and decree foreclosure, though charged with knowledge of mortgage, did not make mortgagee party to such suit, mortgagee was not bound by the judgment and decree. *Middleton v. Watkins Hdwe. Co.*, 196 Ark. 133, 116 S.W.2d 1043 (1938).

Cited: *Lowe's of Ark., Inc. v. Bush*, 282 Ark. 508, 669 S.W.2d 198 (1984).

18-44-124. Contractor to defend actions on liens by third persons — Liability.

(a) In all cases in which a lien shall be filed under the provisions of this subchapter by any person other than a contractor, it shall be the duty of the contractor to defend at his or her own expense any action brought thereupon. During the pendency of the action, the owner may withhold from the contractor the amount of money for which the lien shall be filed.

(b)(1) In case of judgment against the owner or his or her property upon the lien, the owner shall be entitled to deduct from any amount due by him or her to the contractor the amount of the judgment and costs.

(2) If the owner shall have settled with the contractor in full, he or she shall be entitled to recover back from the contractor any amount so paid by the owner for which the contractor was originally liable.

History. Acts 1895, No. 146, § 8, p. 217; C. & M. Dig., § 6919; Pope's Dig., § 8878; A.S.A. 1947, § 51-610.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey of Arkansas Law, Business Law, 5 U. Ark. Little Rock L.J. 91.

CASE NOTES

ANALYSIS

Applicability.
Contractor's Claims.
Deduction by Owner.
Parties.

Applicability.

This subchapter was enacted for the benefit of persons doing work and furnishing material for private individuals or corporations and therefore this section is not applicable in the case of public improvements. *Holcomb v. American Sur. Co.*, 184 Ark. 449, 42 S.W.2d 765 (1931).

Contractor's Claims.

Claims of contractor are subordinated to claims of laborers and materialmen. *Long v. Charles T. Abeles & Co.*, 77 Ark. 156, 93 S.W. 67 (1905).

Deduction by Owner.

Where contractor failed to pay all bills for materials, such unpaid bills were de-

ducted from the amount the contractor would have otherwise been entitled to from the owners. *West v. Page*, 228 Ark. 13, 305 S.W.2d 336 (1957).

Parties.

The contractor is a necessary party to action to enforce lien. *Simpson v. J.W. Black Lumber Co.*, 114 Ark. 464, 172 S.W. 883 (1914); *Cruce v. Mitchell*, 122 Ark. 141, 182 S.W. 530 (1916); *Rasmussen v. Reed*, 255 Ark. 1064, 505 S.W.2d 222 (1974); *Johnson v. Southern Elec., Inc.*, 29 Ark. App. 160, 779 S.W.2d 190 (1989).

Alleged "contractor" not required to be made a party where evidence established that he actually owned property at time lien was filed and subsequently deeded property to defendants. *McCool v. Jones*, 221 Ark. 123, 252 S.W.2d 80 (1952).

Cited: *Superior Iron Works & Supply Co. v. Saulsberry*, 226 Ark. 1032, 295 S.W.2d 626 (1956).

18-44-125. Court orders.

The court shall make orders in the case as will protect and enforce the rights of all interested therein.

History. Acts 1895, No. 146, § 20, p. 217; C. & M. Dig., § 6930; Pope's Dig., § 8892; A.S.A. 1947, § 51-620.

CASE NOTES

Cited: *Cruce v. Mitchell*, 122 Ark. 141, 182 S.W. 530 (1916).

18-44-126. Warning order for nonresident or absconding owners.

Whenever the owner of an erection or improvement, or of land on which an erection or improvement is put, or the owner of any boat or vessel, is a nonresident of the state or resides out of the county in which the erection or other improvement is put, as provided by this subchapter, or when the owner so conceals himself or herself that personal service of summons cannot be had on him or her, then the mechanic, builder, artisan, workman, laborer, or other persons entitled to a lien under this subchapter, upon instituting suit, may cause a warning order to issue and be published as may be prescribed by law for the issuance of warning orders in proceedings under attachment. Such service shall be binding and of full force and effect.

History. Acts 1895, No. 146, § 16, p. 217; C. & M. Dig., § 6929; Pope's Dig., § 8891; A.S.A. 1947, § 51-619.

CASE NOTES**Personal Service Within State.**

Personal service on defendant anywhere in the state is sufficient if suit is

instituted in county where property is located. *Carr v. Hahn*, 126 Ark. 609, 191 S.W. 232 (1917).

18-44-127. Trial and judgment.

(a) The court shall ascertain by a fair trial, in the usual way, the amount of the indebtedness for which the lien is prosecuted and may render judgment therefor in any sum not exceeding the amount claimed in the demand filed with the lien, together with interest and costs, although the creditor may have unintentionally failed to render in his or her account when filed the full amount of credits to which the debtor may have been entitled.

(b) The judgment if for the plaintiff shall be that he or she recover the amount of the indebtedness found due, to be levied out of the property charged with the lien therefor, and the property charged shall be correctly described in the judgment.

History. Acts 1895, No. 146, § 14, p. 217; C. & M. Dig., § 6931; Pope's Dig., § 8893; A.S.A. 1947, § 51-621.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Annual Survey of Caselaw: Contract Law 27 U. Ark. Little Rock L. Rev. 665.

CASE NOTES

Priority of Liens.

Until the amount due the lienholder is determined under this section, the lien is not choate so as to have priority over a federal tax lien established subsequent to the filing of the mechanic's or materialmen's lien. *United States v. McGehee*, 237 Ark. 698, 375 S.W.2d 365 (1964).

Cited: *RMP Rentals v. Metroplex, Inc.*, 356 Ark. 76, 146 S.W.3d 861 (2004); *Concrete Wallsystems of Ark., Inc. v. Master Paint Indus. Coating Corp.*, 95 Ark. App. 21, 233 S.W.3d 157 (2006).

18-44-128. Attorney's fee.

(a) When any contractor, subcontractor, laborer, or material supplier who has filed a lien, as provided for in this chapter, gives notice thereof to the owner of property by any method permitted under § 18-44-115(b)(5) and the claim has not been paid within twenty (20) days from the date of service of the notice, and if the contractor, subcontractor, laborer, or material supplier is required to sue for the enforcement of his or her claim, the court shall allow the successful contractor, subcontractor, laborer, or material supplier a reasonable attorney's fee in addition to other relief to which he or she may be entitled.

(b) If the owner is the prevailing party in the action, the court shall allow the owner a reasonable attorney's fee in addition to any other relief to which the owner may be entitled.

History. Acts 1961, No. 240, § 1; A.S.A. 1947, § 51-639; Acts 1995, No. 1298, § 9; 2009, No. 454, § 5.

CASE NOTES

ANALYSIS

Denial Proper.
Prevailing Party.
Successful Party.

Denial Proper.

Trial court did not err in denying a construction company's request for attorney's fees as the successful party in its lien-foreclosure action against property owners as the company had a full and fair

opportunity in the arbitration proceedings to litigate the issue of attorney's fees, and the fact that the company submitted its disputes to arbitration implied an agreement to be bound by the arbitrator's decision. Except in certain limited situations, a valid and final award by an arbitrator had the same effect under the rules of res judicata as the judgment of a court. *Bell-Corley Constr., LLC v. Orange State Realty, Inc.*, 2011 Ark. App. 289, 383 S.W.3d 442 (2011).

Prevailing Party.

Where corporation filed a materialman's lien against a contractor when the contractor withheld a retainage because of the alleged poor quality of the corporation's work, the contractor was entitled to attorney's fees as the prevailing party because the contractor was awarded three-fourths of the money at issue. *CJ Bldg. Corp. v. TRAC-10*, 368 Ark. 654, 249 S.W.3d 793 (2007).

Circuit court erred in awarding attorney's fees to a lienor because it was not successful in enforcing its claim to a materialmen's lien. *Florida Oil Investment Group, LLC v. Goodwin & Goodwin, Inc.*, 2015 Ark. App. 209, 463 S.W.3d 323 (2015).

Successful Party.

Because the circuit court erred in denying a surety's motion for directed verdict, a subcontractor was no longer the prevailing party and was not entitled to attorney's fees under either the subcontractor or the attorney-fee statute, and it was not the "successful party" entitled to attorney's fees under the materialmen's lien statute. *Travelers Cas. & Sur. Co. of Am. v. Sweet's Contr., Inc.*, 2014 Ark. 484, 450 S.W.3d 229 (2014).

Cited: *Hickman v. Kralicek Realty & Constr. Co.*, 84 Ark. App. 61, 129 S.W.3d 317 (2003).

18-44-129, 18-44-130. [Repealed.]

Publisher's Notes. These sections, concerning execution generally, sales under execution, and removal, were repealed by Acts 1995, No. 1298, § 10. The sections were derived from the following sources:

18-44-129. Acts 1895, No. 146, § 21, p.

217; C. & M. Dig., § 6932; Pope's Dig., § 8894; A.S.A. 1947, § 51-622.

18-44-130. Acts 1895, No. 146, § 3, p. 217; C. & M. Dig., § 6909; Pope's Dig., § 8868; A.S.A. 1947, § 51-605.

18-44-131. Duty to enter satisfaction.

(a) Whenever any indebtedness which is a lien on any real estate, erection, building, or other improvement is paid and satisfied, it shall be the duty of the creditor to enter satisfaction of the lien upon the record or margin thereof in the office of the clerk of the circuit court.

(b) Any creditor refusing or neglecting to do so for ten (10) days after payment shall be liable to any person injured to the amount of injury and for cost of suit.

History. Acts 1895, No. 146, § 23, p. 217; C. & M. Dig., § 6934; Pope's Dig., § 8896; A.S.A. 1947, § 51-624.

18-44-132. Penalty for failure to discharge lien after payment.

(a) It shall be unlawful for any contractor, subcontractor, or other person who has performed work or furnished materials for the improvement of any property when the work or materials may give rise to a mechanic's, laborer's, or materialman's lien under the laws of this state, this subchapter and §§ 18-44-201 — 18-44-210 and 18-44-301 — 18-44-305, or any other statute providing for a mechanic's, laborer's, or materialman's lien, or the assignee of such person, knowingly to receive payment of the contract price or any portion of it without applying the money so received toward the discharge of any liens known to the person receiving the payment, or properly record it as required by

statutes, with the intent thereby to deprive the owner or person so paying the contractor or other person receiving payment of his or her funds without discharging the liens and thereby to defraud the owner or person so paying.

(b) In any prosecution under this section as against the person so receiving payment, when it shall be shown in evidence that any lien for labor or materials existed in favor of any mechanic, laborer, or materialman and that the lien has been filed within the time provided by law in the office of the circuit clerk or other officer provided by law for the filing of such liens, and that the contractor, subcontractor, or other person charged has received payment without discharging the lien to the extent of the funds received by him or her, then the fact of acceptance of the payment without having discharged the lien within ten (10) days after receipt of the payment or the receipt of notice of the existence of the lien, whichever event shall occur last, shall be prima facie evidence of intent to defraud on the part of the person so receiving payment.

(c)(1) If the amount of the contract price so received and not applied to the discharge of the liens, with the intent to defraud, shall exceed the sum of twenty-five dollars (\$25.00), the party so receiving shall be deemed guilty of a felony and shall be punished by a fine not exceeding one thousand dollars (\$1,000) or by imprisonment in the Department of Corrections for not less than one (1) year nor more than five (5) years, or by both.

(2) If the amount so received does not exceed the sum of twenty-five dollars (\$25.00), the party shall be deemed guilty of a misdemeanor and punished by imprisonment in the county jail for not more than one (1) year or by fine not less than ten dollars (\$10.00) nor more than three hundred dollars (\$300), or by both.

History. Acts 1963, No. 66, § 1; A.S.A. 1947, § 51-640.

RESEARCH REFERENCES

Ark. L. Rev. Statutory Presumptions: A Permissible Inference, 29 Ark. L. Rev. 247.

CASE NOTES

ANALYSIS	
Burden of Proof.	proof when the lien is established, payment is proven, and the failure to satisfy the lien is shown. <i>State v. Jacks</i> , 243 Ark. 77, 418 S.W.2d 622 (1967).
Evidence.	
Instructions.	Evidence.
Burden of Proof.	In prosecution under this section it is error to exclude evidence that defendant's insolvency and consequent failure to satisfy the liens resulted from inexperience, which led them to make improvident contracts, as the jury might have found that
In prosecution under this section, the presumption of innocence remains with the accused and the burden of proof on the whole case is on the state. The accused is merely required to go forward with his	

there was in fact no intent to defraud. *Reno v. State*, 241 Ark. 127, 406 S.W.2d 372 (1966).

Instructions.

Subsection (b) of this section should not be read to the jury as it involves a comment on the evidence and is prohibited by

Ark. Const., Art. 7, § 23. The legislature cannot by statute empower the trial judge to make such a comment. *Reno v. State*, 241 Ark. 127, 406 S.W.2d 372 (1966).

Cited: *Stone v. State*, 254 Ark. 1011, 498 S.W.2d 634 (1973); *French v. State*, 256 Ark. 298, 506 S.W.2d 820 (1974).

18-44-133, 18-44-134. [Repealed.]

Publisher's Notes. These sections, concerning lien of architect, engineer, surveyor, appraiser, abstractor, or title insurance agent, and landscaping services and supplies, were repealed by Acts 2009, No.

454, § 6. The sections were derived from the following sources:

18-44-133: Acts 1987, No. 1035, § 1; 1991, No. 786, § 30.

18-44-134: Acts 1995, No. 1298, § 11.

18-44-135. Jointly owned property.

In the event that property is jointly owned, the signature of one (1) of the owners is sufficient for the purposes of this chapter.

History. Acts 1995, No. 1298, § 12.

CASE NOTES

Cited: *Hickman v. Kralicek Realty & Constr. Co.*, 84 Ark. App. 61, 129 S.W.3d 317 (2003).

SUBCHAPTER 2 — WELLS, MINES, AND QUARRIES GENERALLY

SECTION.

18-44-201. Construction.

18-44-202. Right to lien in general — Extent.

18-44-203. Furnishing materials or labor to contractors or subcontractors.

18-44-204. Labor or materials furnished refinery or gasoline extraction plants.

18-44-205. Improvements on leased land.

SECTION.

18-44-206. Priority generally.

18-44-207. Lien of common laborer superior.

18-44-208. Proceedings for establishment and enforcement.

18-44-209. Sale or removal of property subject to lien.

18-44-210. Limitation of liability.

18-44-211. Lien on output and equipment of oil or gas well.

Cross References. Laborer's liens on oil and gas wells, mines or quarries, § 18-43-103.

Effective Dates. Acts 1923, No. 513, § 3: effective on passage.

Acts 1923, No. 615, § 13: Mar. 23, 1923. Emergency clause provided: "This act be-

ing necessary for the immediate preservation of the public health, peace and safety, an emergency is hereby declared to exist and this act shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

Ark. L. Rev. Creditors' Provisional Remedies and Debtors' Due Process Rights: Statutory Liens in Arkansas, 32 Ark. L. Rev. 185.

CASE NOTES

ANALYSIS

Purpose.
Compliance With Mechanic's Lien Statutes.
Limitation of Actions.

Purpose.
Sections 18-44-201 — 18-44-210 were clearly intended to strengthen and aid § 18-44-211. *Pilcher v. Parker*, 173 Ark. 837, 293 S.W. 738 (1927).

Compliance With Mechanic's Lien Statutes.

In an action to declare and enforce liens brought under §§ 18-44-201 — 18-44-210,

failure to comply with §§ 18-44-114 and 18-44-117 was fatal to personal judgment against the owner. *Hirsch v. Farris*, 174 Ark. 1040, 298 S.W. 487 (1927).

Limitation of Actions.

An action to enforce a lien under §§ 18-44-201 — 18-44-210 does not come within § 18-43-105 as liens are creatures of statute and must be perfected and enforced according to the statutes under which they are created. *Hirsch v. Farris*, 174 Ark. 1040, 298 S.W. 487 (1927).

18-44-201. Construction.

The provisions of this section and §§ 18-44-202 — 18-44-210 shall not be construed to deprive or abridge materialmen, artisans, laborers, or mechanics of any rights and remedies given them by law, and the provisions of this section and §§ 18-44-202 — 18-44-210 shall be cumulative of the lien laws of this state.

History. Acts 1923, No. 615, § 6; Pope's Dig., § 8910; A.S.A. 1947, § 51-706.

18-44-202. Right to lien in general — Extent.

(a) Any person, corporation, firm, association, partnership, material man, artisan, laborer, or mechanic who when under contract, express or implied, made with the owner or lessee of any land, mine, or quarry, or the owner of any gas, oil, or mineral leasehold interest in land, or the owner of any gas pipeline or oil pipeline, or owner of any oil or gas pipeline right-of-way, or with the trustee, agent, or receiver of any such owner, performs labor, or furnishes fuel, material, machinery, or supplies used in the digging, drilling, torpedoing, operating, completing, equipping, maintaining, or repairing of any oil or gas well, water well, mine or quarry, or oil or gas pipeline, including any and all tanks or other receptacles used or intended for the storage of oil, regardless of where the oil is produced, shall have a lien on:

(1) The whole of the land or leasehold interest therein;

(2) Any oil pipeline or gas pipeline including the right-of-way for the pipeline;

(3) Any lease for oil and gas purposes, the buildings and appurtenances, the materials and supplies so furnished, the oil well, gas well, water well, oil or gas pipeline, mine, or quarry for which they are furnished, and on all of the other oil wells, gas wells, buildings and appurtenances including pipelines, leasehold interests, and land used in operating for oil, gas, and other minerals; or

(4) The leasehold, land, or pipeline and the right-of-way therefor for which the material and supplies were furnished or labor performed, whether they are movable or not.

(b) If labor supplies, machinery, or material are furnished to a leaseholder, the lien created by this section shall not attach to the underlying fee title to the land.

History. Acts 1923, No. 615, § 1; Pope's Dig., § 8905; A.S.A. 1947, § 51-701.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Arkansas Law Survey, Scroggins, Debtor-Creditor, 9 U. Ark. Little Rock L.J. 147.

CASE NOTES

ANALYSIS

Construction.

Contract.

Contractors.

Fuel.

Perfection of Lien.

Property Subject to Lien.

—Ownership of Property.

Construction.

The "whole of the leasehold interest" as used in this section means the whole interest of the owner who made the contract for labor or material. *Roberts v. Tice*, 198 Ark. 397, 129 S.W.2d 258 (1939).

The word "owner" as used in this section refers to the owner with whom the lien claimants contracted and the lien attaches to the property of the "owner." *Roberts v. Tice*, 198 Ark. 397, 129 S.W.2d 258 (1939).

Contract.

A lien given by this section must have its foundation in a contract either express or implied. *Crown Cent. Petroleum Corp. v. Frick-Reid Supply Co.*, 173 Ark. 983, 293 S.W. 1012 (1927).

Foundation of right to secure a lien for labor performed or material furnished must be a contract with the owner of the land upon which the lien is sought to be enforced, and, if there does not exist such a contract, express or implied, the person claiming it must fail. *Roberts v. Tice*, 198 Ark. 397, 129 S.W.2d 258 (1939).

Where the lienholder's complaint implied but did not allege a contract and no pleadings were filed attacking the sufficiency of the complaint, it was not error to permit the lienholder to testify to the existence of a contract. *Myers v. Majors*, 242 Ark. 326, 413 S.W.2d 661 (1967).

Contractors.

Lien extends to a contractor. *Lammers v. Cart-Ritter Co.*, 196 Ark. 1159, 121 S.W.2d 95 (1938).

Fuel.

This section gives a materialman who shall furnish fuel material a lien for gas used in operating an oil drill, since the gas was intended to constitute fuel material just as much as coal, oil, or wood. *Crown Cent. Petroleum Corp. v. Frick-Reid Supply Co.*, 173 Ark. 983, 293 S.W. 1012 (1927).

Perfection of Lien.

Claimant seeking to impress a lien under this section must show that he filed the affidavit provided by § 18-44-117 within statutory period after the work was "in good faith performed" as provided by § 18-44-208. *Smith v. Grandbush*, 233 Ark. 806, 348 S.W.2d 880 (1961).

Where evidence showed that defendant no longer had any interest in well for a period longer than statutorily allowed before filing of plaintiff's affidavit and plaintiff contended he was working for the defendant, the affidavit was not filed in time. *Smith v. Grandbush*, 233 Ark. 806, 348 S.W.2d 880 (1961).

Property Subject to Lien.

Lien for construction and equipment of irrigation well extended to all land mentioned in contracts for construction of well and installation of pumping equipment. *Lammers v. Cart-Ritter Co.*, 196 Ark. 1159, 121 S.W.2d 95 (1938).

Laborers and materialmen furnishing labor and materials to drilling company were not entitled to lien against the overriding royalty interest of drilling company's assignor. *Roberts v. Tice*, 198 Ark. 397, 129 S.W.2d 258 (1939).

Lien of materialmen on an oil rig was not sustained since derrick and machinery were not "appurtenances". *Bennett v. Weis*, 205 Ark. 198, 168 S.W.2d 379 (1943).

This section which creates a materialmen's lien on an oil and gas leasehold does not create a lien on oil produced therefrom and delivered to a pipe line. *Tarheel Drilling & Equip. Co. v. Valley Steel Prods. Co.*, 231 Ark. 510, 330 S.W.2d 717 (1960).

This subchapter does not give the operator of the working interest a lien on the oil produced, only on the leasehold and equipment. *American Nat'l Bank v. Dux*, 286 Ark. 309, 691 S.W.2d 851 (1985).

—Ownership of Property.

The lien provided for in this section does not extend to the property of a third party when the nature of its use shows it was not to remain a part of the leased premises. *Bennett v. Weis*, 205 Ark. 198, 168 S.W.2d 379 (1943).

Where a wife was not a party to a workman's contract made by husband the mechanic's lien would not attach to the wife's interest in the real estate. *Franks v. Wood*, 217 Ark. 10, 228 S.W.2d 480 (1950).

Where purchaser of land entered into agreement for drilling of water well thereon, and later defaulted in the purchase price, well driller would have lien under this section for labor and materials against the equitable interest of the purchaser in the premises, subject to vendor's lien for purchase price. *Snodgrass v. Huff*, 218 Ark. 113, 234 S.W.2d 505 (1950).

Person performing work on water well for purchaser of land under contract was entitled to lien only on purchaser's interest and where purchaser obtained a decree for cancellation of contract and recover of down payment, the lien extended only to that fund. *Massey v. Tyra*, 217 Ark. 970, 234 S.W.2d 759 (1950).

Cited: *Atkinson v. Van Echaute*, 236 Ark. 423, 366 S.W.2d 273 (1963); *Dews v. Halliburton Indus., Inc.*, 288 Ark. 532, 708 S.W.2d 67 (1986).

18-44-203. Furnishing materials or labor to contractors or subcontractors.

Any person, corporation, firm, association, partnership, or materialman who furnishes machinery, material, or supplies to a contractor or subcontractor or any person who performs labor under a subcontractor with a contractor, or who as an artisan or day laborer in the employ of a contractor or subcontractor performs any labor, shall have a lien on the land or leasehold interest therein, or on the oil pipeline or gas pipeline including the pipeline right-of-way, or on a lease for oil or gas purposes, on the buildings and appurtenances, and on the materials and supplies furnished and on the oil well, gas well, water well, oil or gas pipeline and the right-of-way therefor, mine, or quarry for which they are furnished, and on all of the other oil wells, buildings and appurtenances, leasehold interest, oil or gas pipeline including right-

of-way, or land used in the operating for oil, gas, or other minerals upon which leasehold or land for which the material and supplies were furnished and labor performed, in the same manner and to the same extent as the original contractor, for the amount due him or her for the material furnished or labor performed.

History. Acts 1923, No. 615, § 3; Pope's Dig., § 8907; A.S.A. 1947, § 51-703.

CASE NOTES

ANALYSIS

Contractors.

Property Subject to Lien.

Contractors.

Well driller, who executed a letter agreement with owner of mineral lease for drilling of well, was a contractor. *Superior Oil Co. v. Etheridge*, 219 Ark. 289, 242 S.W.2d 718 (1951).

Property Subject to Lien.

Plaintiff, who furnished material to well driller who was drilling a well for oil company pursuant to unrecorded letter contract, had a lien on equipment of oil

company located on premises. *Superior Oil Co. v. Etheridge*, 219 Ark. 289, 242 S.W.2d 718 (1951).

Materialman does not have a lien on contingent interest of well driller in leasehold. *Brooks v. Superior Oil Co.*, 210 F.2d 533 (8th Cir. 1954).

Where contract between well driller and oil company provided for reimbursement of reasonable and necessary expenses in producing well, but expenses were never paid by well driller, a materialman who furnished supplies to well driller did not have a lien on well driller's right to reimbursement. *Brooks v. Superior Oil Co.*, 210 F.2d 533 (8th Cir. 1954).

18-44-204. Labor or materials furnished refinery or gasoline extraction plants.

(a) The lien created by this section and §§ 18-44-201 — 18-44-203 and 18-44-205 — 18-44-210 shall apply in favor of any person, corporation, firm, association, or partnership who shall furnish any material, machinery, or supplies or perform any labor in the erection, operation, or repair of any refinery or gasoline extraction plant.

(b) The lien shall cover the plant, together with the land upon which it is situated, including all pipelines belonging to the refinery or gasoline extraction plant and used in connection therewith.

History. Acts 1923, No. 615, § 2; Pope's Dig., § 8906; A.S.A. 1947, § 51-702.

18-44-205. Improvements on leased land.

The provisions of § 18-44-103 shall not apply to liens created by this subchapter, and in foreclosures under this section and §§ 18-44-201 — 18-44-204 and 18-44-206 — 18-44-210, all the right, title, and interest of the leaseholder shall be subjected to the lien created by it.

History. Acts 1923, No. 615, § 10; Pope's Dig., § 8914; A.S.A. 1947, § 51-709.

18-44-206. Priority generally.

(a)(1) The lien given in this section and §§ 18-44-201 — 18-44-205 and 18-44-207 — 18-44-210 against the land or leasehold interest in the land, on the oil pipeline or gas pipeline, including the right-of-way, on any lease for oil and gas purposes, including the buildings and appurtenances on the land, on the materials and supplies so furnished, on the oil well, gas well, water well, oil or gas pipeline, mine, or quarry for which the materials were furnished or labor performed, and on all other oil wells, gas wells, and water wells on the lands shall be prior and paramount to, and in preference of, any and all subsequent liens, encumbrances, and mortgages.

(2) Except as provided in this subchapter, all liens established in this subchapter shall be of equal dignity.

(b)(1) The lien provided for in this section and §§ 18-44-201 — 18-44-205 and 18-44-207 — 18-44-210 shall attach to the machinery, material, supplies, and to any specific improvements made in preference to any prior lien, encumbrance, or mortgage upon the land or leasehold interest upon which the machinery, material, supplies, or specific improvements are placed or located.

(2) However, any lien, encumbrance, or mortgage upon the land, or any leasehold interest, existing at the time of the inception of the lien provided for in these sections shall not be affected by the new lien, and such holders of liens upon the land or leasehold interest shall not be necessary parties in suits to foreclose the lien created.

History. Acts 1923, No. 615, § 4; Pope's Dig., § 8908; A.S.A. 1947, § 51-704.

CASE NOTES

ANALYSIS

Chattel Mortgages.
Federal Liens.
Royalties.

Chattel Mortgages.

Lien was not superior to the lien given by a chattel mortgage on the leasehold interest and equipment of the mine existing at the inception of the miner's lien. *Estep v. Blue Ribbon Coal Co.*, 177 Ark. 83, 9 S.W.2d 331 (1928).

Federal Liens.

Mortgage taken by United States government which by its terms gave government a lien paramount to all other liens took precedence over subsequent liens filed by miners for labor and materials furnished to plant premises, since mort-

gage was recorded before the furnishing of any labor or materials and its priority was dictated by federal, rather than state law. *United States v. Latrobe Constr. Co.*, 246 F.2d 357 (8th Cir.), cert. denied, 355 U.S. 890, 78 S. Ct. 262, 2 L. Ed. 2d 189 (1957).

Royalties.

Where contract for labor and material was made with drilling company owning leasehold estate and not with the owners of the overriding royalty, only the interest of the drilling company could be charged with or subjected to a lien, and royalty interest was at least an encumbrance on the leasehold estate protected by this section from liens of laborers and materialmen employed by drilling company. *Roberts v. Tice*, 198 Ark. 397, 129 S.W.2d 258 (1939).

18-44-207. Lien of common laborer superior.

(a) As between the various liens provided by §§ 18-44-202 — 18-44-204, that given common laborers shall be superior to all other liens perfected under this section and §§ 18-44-201 — 18-44-206 and 18-44-208 — 18-44-210.

(b) The term “common laborer” shall mean not only persons actually performing manual labor in the drilling, operating, completing, equipping, maintaining, and repairing oil or gas wells, but to also include persons hauling supplies or machinery to be used in the drilling, operating, equipping, maintaining, or repairing of any oil or gas wells.

History. Acts 1923, No. 615, § 12; Pope’s Dig., § 8915; A.S.A. 1947, § 51-710.

18-44-208. Proceedings for establishment and enforcement.

(a) Except as expressly provided in this section and §§ 18-44-201 — 18-44-207 and 18-44-209 — 18-44-210, the lien created under the provisions of these sections shall be construed, established, preserved, and enforced in like manner and in the same time as liens of mechanics are construed, established, preserved, and enforced.

(b)(1) When the labor performed or the material, supplies, or machinery furnished was entered under an open, running account, that shall be construed as a continuous contract, and the time within which the verified statement of the claim for lien shall be filed with the clerk of the circuit court shall be computed from the time upon which the last labor was in good faith performed or the last material, machinery, or supplies were in good faith furnished.

(2) The lien provided for, when perfected in the manner set out in this subchapter, shall be held in law and equity as security for the entire open, running account whether it has been partially closed by note or not.

(c)(1) Whenever any person shall remove any encumbered property to a county other than the one in which the lien has been filed, the lienholder, within ninety (90) days after removal, may file an itemized inventory of the property so removed.

(2)(A) The inventory shall show how much there is due and unpaid thereon and shall be filed with the circuit clerk of the county to which it has been removed.

(B) This filing shall operate as notice of the existence of the lien and the lien shall attach, and extend to, the land or leasehold and other premises, properties, and appurtenances to which the properties so removed shall attach of the kind and character enumerated in §§ 18-44-202 — 18-44-204.

History. Acts 1923, No. 615, § 8; Pope’s Dig., § 8912; A.S.A. 1947, § 51-708.

CASE NOTES

ANALYSIS

Limitation of Actions.
Perfection of Lien.

Limitation of Actions.

Limitations period for action commenced under § 18-44-209 was not suspended by bankruptcy of lienholder's vendee where suit was against third persons who allegedly converted the materials furnished the vendee. *Superior Iron Works & Supply Co. v. Saulsberry*, 226 Ark. 1032, 295 S.W.2d 626 (1956).

Limitations period of § 18-44-119 as made applicable to miners' liens by this section is applicable to a complaint based on § 18-44-209. *Superior Iron Works & Supply Co. v. Saulsberry*, 226 Ark. 1032, 295 S.W.2d 626 (1956).

Suit held barred by the limitations period on lien foreclosure. *Superior Iron Works & Supply Co. v. Saulsberry*, 226 Ark. 1032, 295 S.W.2d 626 (1956).

Under the mechanic's lien law the time within which the operator of the working interest of an oil well must bring an action to foreclose his operator's lien begins to

run not from the date of a default but from the time the last item is furnished. *American Nat'l Bank v. Dux*, 286 Ark. 309, 691 S.W.2d 851 (1985).

Perfection of Lien.

Liens given by this statute must be perfected and enforced in the manner provided in §§ 18-44-114 and 18-44-117. *Hirsch v. Farris*, 174 Ark. 1040, 298 S.W. 487 (1927).

The affidavit for a lien provided for by this section may be made before a deputy clerk. *Lammers v. Cart-Ritter Co.*, 196 Ark. 1159, 121 S.W.2d 95 (1938).

Claimant seeking to impress lien under § 18-44-202 must show he filed the affidavit provided by § 18-44-117 within the statutorily required period after the work was "in good faith performed" as provided by this section. *Smith v. Grandbush*, 233 Ark. 806, 348 S.W.2d 880 (1961).

Where evidence showed that defendant no longer had any interest in well for a period longer than statutorily required period before filing of plaintiff's affidavit, affidavit was not filed in time. *Smith v. Grandbush*, 233 Ark. 806, 348 S.W.2d 880 (1961).

18-44-209. Sale or removal of property subject to lien.

(a) When the lien provided for in this section and §§ 18-44-201 — 18-44-208 and 18-44-210 shall have attached to the property covered thereby, neither the owner of the land nor the owner of the oil, gas, or mineral leasehold interest therein, the owner of any gas pipeline or oil pipeline, the contractor, the subcontractor, the purchaser, the trustee, receiver, or agent, of the owner, lessor, lessee, contractor, subcontractor, or purchaser shall either sell or remove any property subject to the lien, cause it to be removed from the land or premises upon which the property was to be used, or otherwise sell or dispose of it without the written consent of the holder of the lien created.

(b)(1) In case of any violation of the provision of this section, the same lienholder shall be entitled to the possession of the property upon which the lien exists wherever the property is found, together with the land or leasehold to which the property may have been attached.

(2) The lienholder is entitled to have it then sold for the payment of his or her debt, whether the debt has become due or not.

History. Acts 1923, No. 615, § 5; Pope's Dig., § 8909; A.S.A. 1947, § 51-705.

CASE NOTES

ANALYSIS

Limitation of Actions.
 Lis Pendens.
 Sale of Lease.

Limitation of Actions.

Limitations period for action commenced under this section was not suspended by bankruptcy of lienholder's vendee where the suit was against third persons who allegedly converted the materials furnished the vendee. *Superior Iron Works & Supply Co. v. Saulsberry*, 226 Ark. 1032, 295 S.W.2d 626 (1956).

Limitations period of § 18-44-119 as made applicable to miners' liens by § 18-44-208 is applicable to a complaint under this section. *Superior Iron Works & Supply Co. v. Saulsberry*, 226 Ark. 1032, 295 S.W.2d 626 (1956).

The provisions of this section do not fix a separate period of limitations for a suit for conversion so that such suits must be brought within the limitations period provided by § 18-44-119 from the filing of the

liens regardless of when conversion occurs. *Superior Iron Works & Supply Co. v. Saulsberry*, 226 Ark. 1032, 295 S.W.2d 626 (1956).

Lis Pendens.

A lienholder may protect himself against an actionable conversion of property to which his lien attaches which has not occurred at the time he files his foreclosure suit by filing a notice of lis pendens, and if the property be thereafter converted by a stranger to the case, such person would take subject to the outcome of the foreclosure litigation. *Superior Iron Works & Supply Co. v. Saulsberry*, 226 Ark. 1032, 295 S.W.2d 626 (1956).

Sale of Lease.

Owner of leasehold who sold leasehold following drilling of oil well was liable in conversion to plaintiffs who sold material to oil driller where material was used in drilling of oil well under contract with owner of leasehold. *Brooks v. Superior Oil Co.*, 198 F.2d 89 (8th Cir. 1952).

18-44-210. Limitation of liability.

Nothing in §§ 18-44-201 — 18-44-209 shall be construed to fix a greater liability against the owner of the land or leasehold interest in the land than the price or sum stipulated to be paid in the contract under which the material is furnished or labor performed.

History. Acts 1923, No. 615, § 7; Pope's Dig., § 8911; A.S.A. 1947, § 51-707.

18-44-211. Lien on output and equipment of oil or gas well.

(a)(1) Any person working in or about the drilling or operation of any oil or gas well or any well being drilled for oil or gas in this state shall have a lien upon the output and production of the oil or gas well for the amount due for his or her work.

(2) In addition, his or her lien shall attach to all the machinery, tools, equipment, and implements used in the drilling or operation of oil or gas wells, including all leases to oil or gas rights on the land upon which the drilling or operation is performed.

(b)(1) This lien shall not be construed to be a lien upon the real estate of the employer or lessee.

(2) However, the lien shall be upon the personal property used and connected with the drilling and operations, on the output or production of the oil or gas wells, and on the oil or gas lease on the land.

(c) This lien shall be enforced in the same manner provided by law for the enforcement of laborer's liens.

History. Acts 1923, No. 513, §§ 1, 2; Pope's Dig., §§ 8916, 8917; A.S.A. 1947, §§ 51-320, 51-321.

CASE NOTES

ANALYSIS

Constitutionality.
Construction.
Purpose.
Ownership.
Priority.

Constitutionality.

This section is not unconstitutional as taking property without due process of law. *Pilcher v. Parker*, 173 Ark. 837, 293 S.W. 738 (1927); *Smith v. Luster*, 176 Ark. 263, 2 S.W.2d 1104 (1928).

Construction.

This section was not repealed by §§ 18-44-201 — 18-44-210. *Pilcher v. Parker*, 173 Ark. 837, 293 S.W. 738 (1927).

This section and §§ 18-44-201 — 18-44-210 should be construed together in pari materia, and wherever they conflict §§ 18-44-201 — 18-44-210 must control. *Roberts v. Tice*, 198 Ark. 397, 129 S.W.2d 258 (1939).

Purpose.

The purpose of this section is to protect laborers by permitting them to have declared and enforced a lien for their wages earned by virtue of a contract or agree-

ment with the owner of the lease or his agent on the personal property, including the oil and gas produced, and the leasehold interest of the lessee or his assignee. *Roberts v. Tice*, 198 Ark. 397, 129 S.W.2d 258 (1939).

Ownership.

This section provides for a lien in favor of employees on equipment used in drilling or operating oil or gas wells irrespective of who may be the owner. *Pilcher v. Parker*, 173 Ark. 837, 293 S.W. 738 (1927).

Priority.

A prior lien, encumbrance, or mortgage on only the land or leasehold shall not come ahead of laborer's rights to liens on the machinery, materials, supplies, and specific improvements not specifically covered by the prior lien, encumbrance, or mortgage. *Roberts v. Tice*, 198 Ark. 397, 129 S.W.2d 258 (1939).

Laborers were not entitled to lien against the overriding royalty interest of drilling company's assignor. *Roberts v. Tice*, 198 Ark. 397, 129 S.W.2d 258 (1939).

Cited: *Tarheel Drilling & Equip. Co. v. Valley Steel Prods. Co.*, 231 Ark. 510, 330 S.W.2d 717 (1960).

SUBCHAPTER 3 — WELLS, MINES, AND QUARRIES — TRUCKING AND TEAMING CONTRACTORS

SECTION.

18-44-301. Construction.
18-44-302. Right to lien — Extent.
18-44-303. Priority.
18-44-304. Proceedings for establishment and enforcement.

SECTION.

18-44-305. Removal of property subject to lien.

18-44-301. Construction.

The provisions of this subchapter shall not be construed to deprive or abridge materialmen, artisans, laborers, or mechanics of any rights and remedies given them by law, and the provisions of this subchapter shall

be cumulative of the present lien laws of this state, except as repealed or modified by this subchapter.

History. Acts 1941, No. 71, § 4; A.S.A. 1947, § 51-714.

18-44-302. Right to lien — Extent.

(a) Any person, corporation, firm, association, or partnership, designated as a trucking contractor or teaming contractor and engaged in the hauling of oil field equipment used in, or about, the drilling of oil and gas wells or the operation of oil or gas leases in the production of oil or gas therefrom, who under contract, express or implied, made with the owner or lessee of any land, or the owner of any gas, oil, or mineral leasehold interest in land, or the owner of any gas pipeline or oil pipeline, or owner of any oil or gas pipeline right-of-way, or with the trustee, agent, or receiver of any such owner, furnishes trucks, teams, tractors, draglines, and any other equipment and labor for the hauling of fuel, material, machinery, or supplies used in the digging, drilling, torpedoing, operating, completing, equipping, maintaining, or repairing of any oil or gas well, water well, or oil or gas pipeline, including any and all tanks or other receptacles used or intended for the storage of oil, regardless of where the oil is produced, or used for the clearing of land for location of wells, rights-of-way, or digging of earthen pits upon the land shall have a lien on:

(1) The whole of the land or leasehold interest in the land, the oil pipeline or gas pipeline, including the pipeline right-of-way, the buildings and appurtenances located thereon, and the materials and supplies so hauled by trucks or teams furnished;

(2) All other materials and supplies located upon the land or leasehold interest, whether hauled by the trucks, teams, tractors, draglines, or other equipment, or not and the oil well, gas well, water well, or oil or gas pipeline for which they are hauled; and

(3) All the other oil wells, gas wells, buildings, and appurtenances including pipelines, leasehold interests, and land used in operating for oil or gas under a leasehold interest.

(b)(1) Also included in the lien are the pipelines and the pipeline right-of-way for which the materials, equipment, and supplies were hauled by the trucks, teams, tractors, draglines, or other equipment and all other materials, supplies, or equipment placed upon the land or leasehold interest, whether they are movable or not.

(2) If the hauling is done and performed for a leaseholder, the lien created shall not attach to the underlying fee title to the land.

History. Acts 1941, No. 71, § 1; A.S.A. 1947, § 51-711.

18-44-303. Priority.

(a) The lien given in this subchapter against the land, or leasehold interest in the land, and against the oil pipeline or gas pipeline, including the pipeline right-of-way, the lease for oil or gas purposes, including the buildings and appurtenances situated on the land, the materials and supplies hauled by trucks, teams, tractors, draglines, or other equipment furnished for that purpose and used upon and about the oil or gas well, water well, oil or gas pipeline, and all other supplies, equipment, materials, buildings, and improvements used upon all other oil wells, gas wells, water wells, leasehold interests, etc., upon the leasehold interest or land to which the lien attaches shall be prior and paramount to, and in preference of, any and all prior or subsequent liens, including materialman's liens, encumbrances, mortgages, bills of sale, or assignments of interest.

(b) The lien for hauling shall be of equal dignity with that of the common laborer who actually performs manual labor on or about drilling, operating, completing, equipping, maintaining, and repairing oil or gas wells, or in the production of oil and gas, the laying and removal of pipelines, and the building of storage tanks.

(c) The lien provided for shall attach in preference to any prior or subsequent lien or encumbrances, including materialman's liens, or mortgages, or assignments of interest, or bills of sale.

History. Acts 1941, No. 71, § 2; A.S.A. 1947, § 51-712.

18-44-304. Proceedings for establishment and enforcement.

(a) The lien created in this subchapter shall be construed, established, preserved, and enforced in like manner and in the same time as liens of mechanics are construed, established, preserved, or enforced.

(b) When the trucks, teams, tractors, draglines, or other equipment, and labor are furnished and hauling done was entered under an open, running account, that shall be construed as a continuous contract, and the time within which the verified statement of the claim for lien shall be filed with the clerk of the circuit court shall be computed from the time when the last hauling or excavation work was in good faith performed.

(c) When perfected in the manner set out in this subchapter, the lien provided for in this subchapter shall be held in law and equity as security for the entire open, running account, whether the account has been partially closed by note or not.

History. Acts 1941, No. 71, § 3; A.S.A. 1947, § 51-713.

18-44-305. Removal of property subject to lien.

(a) Whenever any person shall remove any property subject to a lien under this subchapter to a county other than the one in which the lien has been filed, the lienholder, within ninety (90) days thereafter, may file an itemized inventory of the property so removed, showing how much is due and unpaid thereon, with the circuit clerk of the county to which it has been removed.

(b) The filing shall operate as notice of the existence of the lien, and the lien shall attach and extend to the land or leasehold interest and other premises, property, and appurtenances to which the property so removed shall attach.

History. Acts 1941, No. 71, § 3; A.S.A. 1947, § 51-713.

SUBCHAPTER 4 — RAILROADS**SECTION.**

18-44-401. Accrual of lien — Lien of injury.
18-44-402. Priority.

SECTION.

18-44-403. Limitations of actions.
18-44-404. Judgment.
18-44-405. Enforcement.

Cross References. Operation and maintenance of railroads, § 23-12-101 et seq.

Acts 1899, No. 88, § 4: effective on passage.

Effective Dates. Acts 1887, No. 70, § 2: effective on passage.

CASE NOTES

Cited: Tucker v. St. Louis, Iron Mountain & S. Ry., 59 Ark. 81, 26 S.W. 375 (1894); Little Rock, Hot Springs & Tex. Ry. v. Spencer, 65 Ark. 183, 47 S.W. 196

(1898); Choctaw & Memphis R.R. v. Sullivan, 70 Ark. 262, 68 S.W. 495 (1902); Choctaw & Memphis R.R. v. Speer Hdwe. Co., 71 Ark. 126, 71 S.W. 267 (1902).

18-44-401. Accrual of lien — Lien of injury.

There shall be a lien on the railroad for the labor, materials, machinery, fixtures, board, provisions, supplies, loss, damage, and services upon the roadbed, buildings, equipment, income, franchise, right-of-way, and all other appurtenances of the railroad for:

(1) Every mechanic, contractor, subcontractor, builder, artisan, workman, laborer, or other person who shall do or perform any work or labor, or cause to be done or performed any work or labor upon, or furnish any materials, machinery, fixtures, or other things toward the building, construction, or equipment of any railroad, or to facilitating the operation of any railroad whether completed or not;

(2) Every person who performs work of any kind in the construction or repair of any railroad, whether under contract with the railroad or with a contractor or subcontractor thereof;

(3) Every person who furnishes any board, provisions, or supplies for any employees, or teams of any railroad employed in the construction or repair thereof, with the consent or authority of the person authorized to make the construction or repair;

(4) Every person who shall sustain loss or damage to person or property from any railroad for which a liability may exist at law; and

(5) Every person who performs any valuable services, manual or professional, for any railroad by or from which the railroad receives a benefit.

History. Acts 1887, No. 70, § 1, p. 96; § 8555; Pope's Dig., § 11131; A.S.A. 1947, 1899, No. 88, § 1, p. 145; C. & M. Dig., § 73-737.

CASE NOTES

ANALYSIS

Entitlement to Lien.

—Materials.

—Personal Injury or Death.

Judgments.

Property Subject to Lien.

Receiverships.

Entitlement to Lien.

This section includes a foreman. *St. Louis, Iron Mountain & S. Ry. v. Love*, 74 Ark. 528, 86 S.W. 395 (1905).

Where attorneys brought an action which would have given plaintiffs lien on railroad but which parties settled without the knowledge of the attorneys, the attorneys had a lien for their fees upon the roadbed and equipment of the railroad company. *St. Louis, Iron Mountain & S. Ry. v. Hays & Ward*, 128 Ark. 471, 195 S.W. 28 (1917).

An overcharge by a carrier in freight rates does not entitle the person overcharged to a lien on the carrier's roadbed. *Gallup v. St. Louis, Iron Mountain & S. Ry.*, 140 Ark. 347, 215 S.W. 586 (1919).

—Materials.

This section creates a lien in favor of one who furnished materials to build any railroad, whether incorporated or not. *Brown v. Buck*, 54 Ark. 453, 16 S.W. 195 (1891).

This section does not include teams furnished to a subcontractor. *St. Louis, Iron Mountain & S. Ry. v. Love*, 74 Ark. 528, 86 S.W. 395 (1905).

A lien exists whether the materials were furnished to a contractor or to the railroad company direct. *Midland Valley R.R. v. Moran Nut & Bolt Mfg. Co.*, 80 Ark. 399, 97 S.W. 679 (1906).

—Personal Injury or Death.

Plaintiffs in personal injury action could have lien on railroad under clause in this section giving lien to "every person who shall sustain loss or damage to person or property from any railroad for which a liability may exist at law." *St. Louis, Iron Mountain & S. Ry. v. Hays & Ward*, 128 Ark. 471, 195 S.W. 28 (1917).

This section grants a lien in case of claim for death as well as in cases of personal injury. *Thompson v. Glover*, 94 F.2d 544 (8th Cir. 1938).

Judgment against railroad in personal injury suit based on incident prior to bankruptcy reorganization was properly declared a lien against the property of the railroad company. *Missouri Pac. R.R. v. Helmert*, 196 Ark. 1073, 121 S.W.2d 103 (1938).

Judgments.

This section does not authorize personal judgment against purchaser of the railroad. *Kansas City S. Ry. v. King*, 74 Ark. 366, 85 S.W. 1131 (1905).

Property Subject to Lien.

The lien is confined to property of the railroad company within the state. *Chicago, Rock Island & Pac. Ry. v. Smith*, 128 Ark. 223, 193 S.W. 791 (1917).

Receiverships.

A state court was not without jurisdiction to declare a lien against the property of a defendant railway company or to render a judgment for damages although at the time of the trial and of the accrual of the cause of action the railway was

being operated by a receiver appointed by a United States court. *Bush v. Southern Grocery Co.*, 137 Ark. 262, 208 S.W. 299 (1918).

Cited: *St. Louis & N. Ark. R.R. v. Bratton*, 93 Ark. 234, 124 S.W. 752 (1910).

18-44-402. Priority.

A lien created under § 18-44-401 shall be superior and paramount to that of all persons interested in the railroad as managers, lessees, mortgagees, trustees, beneficiaries under trusts, or owners, whether prior in time or not.

History. Acts 1887, No. 70, § 1, p. 96; § 8555; Pope's Dig., § 11131; A.S.A. 1947, 1899, No. 88, § 1, p. 145; C. & M. Dig., § 73-737.

CASE NOTES**Personal Injury.**

Where injury occurred before bankruptcy the claim was entitled to preference even though suit was filed after the initiation of the bankruptcy proceedings. *Thompson v. Glover*, 94 F.2d 544 (8th Cir.

1938); *Missouri Pac. R.R. v. Helmert*, 196 Ark. 1073, 121 S.W.2d 103 (1938).

Cited: *St. Louis & N. Ark. R.R. v. Bratton*, 93 Ark. 234, 124 S.W. 752 (1910); *BB & B Constr. Co. v. FDIC*, 316 Ark. 663, 875 S.W.2d 48 (1994).

18-44-403. Limitations of actions.

The lien mentioned in § 18-44-401 shall not be effectual unless suit is brought upon the claim or unless the claim is filed by order of court with the receiver of the railroad within one (1) year after the claim has accrued.

History. Acts 1887, No. 70, § 1, p. 96; § 8556; Pope's Dig., § 11132; A.S.A. 1947, 1899, No. 88, § 2, p. 145; C. & M. Dig., § 73-738.

CASE NOTES**ANALYSIS**

Personal Injury.
Timeliness.

Personal Injury.

The statutory lien does not attach against a railroad or the receivers thereof where an action against it for personal injuries is brought after the lapse of limitations period. *St. Louis, Iron Mountain & S. Ry. v. Ingram*, 124 Ark. 298, 187 S.W. 452 (1916), *aff'd*, 244 U.S. 647, 37 S. Ct. 741, 61 L. Ed. 1370 (1917).

Lien is a perfected lien at time of injury, the provisions requiring suit to be filed within statutory period and the recital of

lien in judgment being conditions subsequent. *Thompson v. Glover*, 94 F.2d 544 (8th Cir. 1938); *Missouri Pac. R.R. v. Helmert*, 196 Ark. 1073, 121 S.W.2d 103 (1938).

Timeliness.

Judgment could not be obtained against a railroad company and a lien fixed against its property where the cause of action accrued while the railroad was in the hands of a receiver and where the plaintiff did not file suit on the claim or file the claim by order of court with the receiver within the statutory period. *Williams v. Missouri Pac. R.R.*, 134 Ark. 366, 203 S.W. 1038 (1918).

18-44-404. Judgment.

The lien shall be mentioned in the judgment rendered for claimant in the ordinary suit for the claim, or in any order of court allowing such claim as a just charge against any railroad in the hands of a receiver.

History. Acts 1887, No. 70, § 1, p. 96; § 8557; Pope's Dig., § 11133; A.S.A. 1947, 1899, No. 88, § 3, p. 145; C. & M. Dig., § 73-739.

CASE NOTES

Amendment.

Judgment cannot, at a subsequent term, be so amended as to incorporate the

lien. *St. Louis & N. Ark. R.R. v. Bratton*, 93 Ark. 234, 124 S.W. 752 (1910).

18-44-405. Enforcement.

The lien may be enforced by ordinary levy and sale under final or other process at law or equity.

History. Acts 1887, No. 70, § 1, p. 96; § 8557; Pope's Dig., § 11133; A.S.A. 1947, 1899, No. 88, § 3, p. 145; C. & M. Dig., § 73-739.

CASE NOTES

Jurisdiction.

A justice of the peace has no jurisdiction to declare and enforce the lien. *Kansas City S. Ry. v. King*, 74 Ark. 366, 85 S.W. 1131 (1905).

Cited: *Thompson v. Glover*, 94 F.2d 544 (8th Cir. 1938); *Missouri Pac. R.R. v. Helmert*, 196 Ark. 1073, 121 S.W.2d 103 (1938).

SUBCHAPTER 5 — BONDS

SECTION.

18-44-501. Purpose.

18-44-502. Exemption.

18-44-503. Public buildings and improvements.

18-44-504. Construction by religious or charitable organizations.

SECTION.

18-44-505. Option for private construction.

18-44-506. Surety and conditions.

18-44-507. Filing.

18-44-508. Actions — Limitations.

Cross References. Contractors, § 17-25-101 et seq.

Effective Dates. Acts 1911, No. 446, § 8: effective 90 days after passage.

Acts 1953, No. 351, § 9: approved Mar. 28, 1953. Emergency clause provided: "The construction and repair of public and private buildings being delayed and hampered because of the ambiguity in the statutory requirements for contractors' bonds, an emergency is declared to exist and the immediate operation of this act being necessary for the preservation of the

public peace, health and safety it shall be in force and effect from and after its passage."

Acts 1957, No. 209, § 6: approved Mar. 12, 1957. Emergency clause provided: "The construction and repair of private and public buildings and other public works being delayed and hampered because of the ambiguity in the statutory requirements for contractors' bonds, an emergency is declared to exist and the immediate operation of this act being necessary for the preservation of the public

peace, health and safety it shall be in force and effect from and after its passage.”

Acts 1987, No. 757, § 3: Apr. 7, 1987. Emergency clause provided: “It is hereby found and declared that because of the large volume of proposed construction by taxing agencies and the confusion that now exists on a large scale concerning the handling of Performance Bonds, to the detriment of contractors, subcontractors, the taxing agencies and the public, that

the clarification made by this act is immediately needed to eliminate said confusion and resulting harmful effects on the public peace, health, safety and welfare. By reason thereof, an emergency is declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in force after its passage and approval.”

RESEARCH REFERENCES

Ark. L. Rev. Mechanic’s Liens on Projects Financed by Act 9, 28 Ark. L. Rev. 280.

Creditors’ Provisional Remedies and Debtors’ Due Process Rights: Statutory Liens in Arkansas, 32 Ark. L. Rev. 185.

U. Ark. Little Rock L.J. Survey of Arkansas: Business Law, 6 U. Ark. Little Rock L.J. 73.

Paul, The Law of Construction Bond in Arkansas: A Review, 9 U. Ark. Little Rock L.J. 333.

18-44-501. Purpose.

The bond required or authorized in this subchapter shall in itself be a full compliance with all other statutes of this state in effect relating to bond requirements on contracts for the repair, alteration, or erection of any building, structure, or improvement, public or private, it being the intention of this subchapter to provide a uniform bonding procedure in conjunction with such contracts.

History. Acts 1953, No. 351, § 4; 1957, No. 209, § 2; A.S.A. 1947, § 51-635.

Cross References. Coverage of con-

tractors’ bonds, § 22-9-401 et seq.

University buildings, construction, § 6-62-301 et seq.

CASE NOTES

Cited: South Cent. Dist. of Pentecostal Church of God of Am., Inc. v. Bruce-Rogers Co., 269 Ark. 130, 599 S.W.2d 702 (1980);

River Valley, Inc. v. American States Ins. Co., 287 Ark. 386, 699 S.W.2d 745 (1985).

18-44-502. Exemption.

This subchapter shall not apply to any contract executed by the Arkansas State Highway and Transportation Department.

History. Acts 1953, No. 351, § 7; A.S.A. 1947, § 51-638.

18-44-503. Public buildings and improvements.

(a) No contract in any sum exceeding twenty thousand dollars (\$20,000) providing for the repair, alteration, or erection of any public

building, public structure, or public improvement shall be entered into by the State of Arkansas or any subdivision thereof, by any county, municipality, school district, or other local taxing unit, or by any agency of any of the foregoing, unless the contractor shall furnish to the party letting the contract a bond in a sum equal to the amount of the contract.

(b) All persons, firms, associations, and corporations who have valid claims against the bond may bring an action on the bond against the corporate surety, provided that no action shall be brought on the bond after twelve (12) months from the date on which the Building Authority Division of the Department of Finance and Administration or institutions exempt from construction review and approval by the division approve final payment on the state contract, nor shall any action be brought outside the State of Arkansas.

History. Acts 1953, No. 351, § 1; 1957, No. 209, § 1; 1969, No. 468, § 1; 1979, No. 539, § 1; A.S.A. 1947, § 51-632; Acts 1987, No. 757, § 1; 2001, No. 961, § 2; 2015 (1st Ex. Sess.), No. 7, § 8; 2015 (1st Ex. Sess.), No. 8, § 8.

A.C.R.C. Notes.

Acts 2015 (1st Ex. Sess.), Nos. 7 and 8, § 1, provided: "Transfer of the Arkansas Building Authority to the Department of Finance and Administration.

"(a)(1) The Arkansas Building Authority is transferred to the Department of Finance and Administration by a type 2 transfer under § 25-2-105.

"(2) For the purposes of this act, the Department of Finance and Administration shall be considered a principal department established by Acts 1971, No. 38.

"(b) All authority, powers, duties, functions, records, personnel, property, unexpended balances of appropriations, allocations, and other funds, including the functions of budgeting or purchasing, are transferred to the Department of Finance

and Administration, except as specified by this act.

"(c) All powers, duties, and functions, including rulemaking, regulation, and licensing, promulgation of rules, rates, regulations, and standards, and the rendering of findings, orders, and adjudications are transferred to the Director of the Department of Finance and Administration.

"(d) The members of the Arkansas Building Authority Council, and their successors, shall continue to be selected in the manner and serve for the terms provided by the statutes applicable to the council except as specified in this act.

"(e) The Arkansas Code Revision Commission shall make appropriate name changes in the Arkansas Code to implement this act."

Amendments. The 2015 amendment by Acts 2015 (1st Ex. Sess.), Nos. 7 and 8, in (b), substituted "the Building Authority Division of the Department of Finance and Administration" for "the Arkansas Building Authority" and "the division" for "the authority".

CASE NOTES

ANALYSIS

Purpose.

Bond Requirement.

Liability on Bond.

Noncompliance.

—Duty to Check Records.

Persons Protected.

—Privity.

Purpose.

The giving of the bond adds nothing to the obligation of the contractor but adds sureties to his obligation, and thus effectively protects those furnishing labor and materials. The legislature intended to substitute the obligation of the bond given by the contractor on public work for the security given by the statutory lien in the

case of property of private individuals. *Oliver Constr. Co. v. Williams*, 152 Ark. 414, 238 S.W. 615 (1922); *Kotchitsky v. Magnolia Petroleum Co.*, 161 Ark. 275, 257 S.W. 48 (1923) (preceding decisions under prior law).

Bond Requirement.

This section requires a bond only when the public authority enters into a contract to repair, alter, or erect a public building, structure, or improvement; where the city housing authority entered into a contract to purchase the public housing units after the units were constructed, a bond was not required. *Rawick Mfg. Co. v. Talisman, Inc.*, 17 Ark. App. 202, 706 S.W.2d 194 (1986).

Liability on Bond.

A contractor's bond is liable only for materials that are actually used in the construction of the building. *Reiff v. Redfield School Bd.*, 126 Ark. 474, 191 S.W. 16 (1916) (decision under prior law).

A surety on a contractor's bond will be liable for a conversion by the contractor of materials furnished for the construction of the improvement, but a cosurety who had no part in such conversion will not be so liable. *Reiff v. Redfield School Bd.*, 126 Ark. 474, 191 S.W. 16 (1916) (decision under prior law).

Where the bond has been executed, the contractor becomes responsible for all labor used in the performance of his contract, unless released by the laborers themselves. *Miller v. Roetzel Bros.*, 155 Ark. 620, 245 S.W. 33 (1922) (decision under prior law).

A claim for coal to run steam shovel was not protected by this bond. *Southern Sur. Co. v. Simon*, 172 Ark. 924, 290 S.W. 960 (1927); *Southern Coal Co. v. McWilliams Co.*, 186 Ark. 775, 55 S.W.2d 932 (1933) (preceding decisions under prior law).

A surety on the bond of the principal contractor constructing drainage ditches for a drainage district is liable for the contractor's default in failing to pay a subcontractor for labor performed and materials furnished in constructing lateral ditches. *Union Indem. Co. v. Forgey*, 174 Ark. 1110, 298 S.W. 1032 (1927) (decision under prior law).

A materialman who furnishes material to a materialman has no recourse against the bond for lack of privity with the prime

contractor, while a materialman who supplies material to a subcontractor in privity with the contractor may recover on the bond. *American States Ins. Co. v. Tri Tech, Inc.*, 35 Ark. App. 134, 812 S.W.2d 490 (1991).

Where prime contractor contracted with defendant to supply miscellaneous metals, and defendant then contracted with plaintiff for handrails and failed to pay the plaintiff, the defendant was a materialman, not a subcontractor and plaintiff could not recover under the bond. *American States Ins. Co. v. Tri Tech, Inc.*, 35 Ark. App. 134, 812 S.W.2d 490 (1991).

Noncompliance.

The directors of a school district are not individually liable to a person furnishing building material to a contractor who was building a schoolhouse because of their failure to require a bond of the contractor. *Blanchard v. Burns*, 110 Ark. 515, 162 S.W. 63 (1913) (decision under prior law).

Trial court properly ruled in favor of a contractor and its president on a steel company's fraud claim because the company could not make out a claim of fraud for failure to obtain a payment bond under subsection (a) of this section as the company did not determine that there was not a bond until after it had provided supplies to the contractor. *Alliance Steel, Inc. v. TNT Constr., Inc.*, 2009 Ark. App. 405, 322 S.W.3d 501 (2009).

—Duty to Check Records.

This section does not create a property right or any constitutional right in materialmen; therefore, even though cities failed to exact bonds from construction companies, the builder did not have a cause of action against the cities when the suppliers subsequently failed to perform, because the builder had no right to rely on this section but, instead, had a duty to check to see if the bonds had been posted. *Arkholand Sand & Gravel Co. v. City of Booneville*, 694 F.2d 528 (8th Cir. 1982).

The burden has been placed on materialmen dealing with a contractor to check the public records to verify the fact that a bond has been obtained before selling supplies to the contractor; accordingly, where a supply company materialman failed to check the records, it could not maintain suit against the school district or its officials to recover the balance of the money

owed the materialman by the contractor. *Beebe School Dist. v. National Supply Co.*, 280 Ark. 340, 658 S.W.2d 372 (1983).

Persons Protected.

Where a bond was executed pursuant to former statute, an action may be maintained by one furnishing labor and materials to recover for services rendered or material supplied. *Reiff v. Redfield School Bd.*, 126 Ark. 474, 191 S.W. 16 (1916); *Aetna Cas. & Sur. Co. v. Henslee*, 163 Ark. 492, 260 S.W. 414 (1924) (preceding decisions under prior law).

Since §§ 18-44-503 and 18-44-508 do not grant to materialmen and mechanics rights against either the public project or funds in the hands of contractor, indemnitors acquired no derivative right to the progress payments through the materialmen and laborers. *United States v. Trigg*, 465 F.2d 1264 (8th Cir. 1972), cert. denied, *First State Bank v. United States*, 410 U.S. 909, 93 S. Ct. 963, 35 L. Ed. 2d 270 (1973).

—Privity.

A person who furnishes material to a subcontractor, being in privity with the prime contractor, may recover on surety bond of prime contractor. *B. Sweetser*

Constr. Co. v. Newman Bros., 236 Ark. 939, 371 S.W.2d 515 (1963).

A manufacturer which sold the material to the distributor who in turn sold material to the subcontractor was not in privity with prime contractor; therefore, surety on bond of prime contractor was not obligated to pay the manufacturer. *B. Sweetser Constr. Co. v. Newman Bros.*, 236 Ark. 939, 371 S.W.2d 515 (1963).

Companies that supplied labor and materials to subcontractors rather than directly to the prime contractor had sufficient privity to contract to be covered by the contractor's statutory performance and payment bond since the claims had their origin in the original contract and grew out of that contract. *River Valley, Inc. v. American States Ins. Co.*, 287 Ark. 386, 699 S.W.2d 745 (1985).

Cited: *National Sur. Corp. v. Edison*, 240 Ark. 641, 401 S.W.2d 754 (1966); *House v. Scott*, 244 Ark. 1075, 429 S.W.2d 108 (1968); *Dow Chem. Co. v. Bruce Rogers Co.*, 255 Ark. 448, 501 S.W.2d 235 (1973); *Valley Metal Works, Inc. v. A.O. Smith-Inland, Inc.*, 264 Ark. 341, 572 S.W.2d 138 (1978); *Milord v. Arkmo Lumber & Supply Co.*, 272 Ark. 462, 615 S.W.2d 349 (1981); *Ergon Asphalt & Emulsions, Inc. v. Hogan Constr. Co.*, 721 F. Supp. 1050 (E.D. Ark. 1989).

18-44-504. Construction by religious or charitable organizations.

(a) No contract in any sum exceeding one thousand dollars (\$1,000) providing for the repair, alteration, or erection of any building, structure, or improvement shall be entered into by any church, religious organization, charitable institution, or by any agency of the foregoing, unless the contractor shall furnish to the party letting the contract a bond in a sum equal to the amount of the contract.

(b)(1) The bond shall be filed in the office of the clerk of the circuit court in the county in which the property is situated.

(2) Any person or his or her assigns to whom there is due any sum for labor or material furnished may bring an action on the bond for the recovery of the indebtedness. No action shall be brought after six (6) months from the completion of the church, hospital, orphanage, charitable institution, or benevolent institution.

(3) If the bond is not filed as provided in this subsection, any person performing labor or furnishing material, except the principal contractor, shall have a lien upon the property for the unpaid amount of the claim.

History. Acts 1911, No. 446, § 5; C. & M. Dig., § 6916; Pope's Dig., § 8875; Acts 1953, No. 351, § 2; A.S.A. 1947, §§ 51-631, 51-633.

CASE NOTES

ANALYSIS

Purpose.
Compliance Mandatory.
Failure to Furnish Bond.
Filing.
Implied Repeal.
Privity.

Purpose.

The purpose of this section was evidently to provide protection for laborers and materialmen for work done and materials furnished upon buildings and improvements for religious and charitable organizations and institutions, which the court had held were not subject to the provisions of the mechanics' and laborers' lien law. *St. Mathews Church v. White*, 172 Ark. 1152, 291 S.W. 977 (1927) (decision under prior law).

Compliance Mandatory.

The bonding of a church construction job is mandatory under this section. *General Elec. Supply Co. v. Downtown Church of Christ*, 24 Ark. App. 1, 746 S.W.2d 386 (1988).

Failure to Furnish Bond.

Where contractor did not furnish a bond as required by this section, unpaid subcontractor was entitled to a material-

man's lien under subsection (b) against a church building for repairs performed. *Milord v. Arkmo Lumber & Supply Co.*, 272 Ark. 462, 615 S.W.2d 349 (1981).

Filing.

A bond given by a contractor binding a principal and surety to indemnify the owner against claims for labor and material, neither having been approved by the clerk of the circuit court nor filed in the clerk's office, was held not a statutory bond. *Mansfield Lumber Co. v. National Sur. Co.*, 176 Ark. 1035, 5 S.W.2d 294 (1928) (decision under prior law).

Implied Repeal.

Subsection (b) was not impliedly repealed by Acts 1953, No. 351. *Milord v. Arkmo Lumber & Supply Co.*, 272 Ark. 462, 615 S.W.2d 349 (1981).

Privity.

A person who furnishes material to a subcontractor is in privity with the prime contractor and has recourse to a prime contractor's bond for the payment of his account. *General Elec. Supply Co. v. Downtown Church of Christ*, 24 Ark. App. 1, 746 S.W.2d 386 (1988).

Cited: *South Cent. Dist. of Pentecostal Church of God of Am., Inc. v. Bruce-Rogers Co.*, 269 Ark. 130, 599 S.W.2d 702 (1980).

18-44-505. Option for private construction.

Any person, firm, corporation, or association entering into a contract for the repair, alteration, or erection of any building, structure, or improvement may, at his or her or its option, require the contractor to furnish a bond in a sum equal to the amount of the contract.

History. Acts 1953, No. 351, § 3; A.S.A. 1947, § 51-634.

CASE NOTES

ANALYSIS

Purpose.
Applicability.
Filing.
Liens.

Purpose.

Former similar statute was only intended to give the owner the privilege of requiring a bond so as to obviate liens of laborers and mechanics and materialmen and to give a lien on a building or other

improvement in favor of subcontractors, laborers or materialmen for the full amount of their respective claims in the event the bond was not given; it had nothing whatever to do with liens of the principal contractor. *Beloate v. W.L. Baker & Co.*, 126 Ark. 67, 189 S.W. 354 (1916) (decision under prior law).

Applicability.

Former statute applied to a suit on the bond of a contractor undertaking to build a Masonic temple since it did not appear that the Masonic order was a charitable or benevolent institution. *Union Indem. Co. v. Covington*, 178 Ark. 533, 12 S.W.2d 884 (1928) (decision under prior law).

Filing.

Where a bond furnished by a contractor provided that it was for the benefit of all

persons entitled to liens, those having liens could have judgment on the bond, though it was not filed in the office of the circuit clerk. *Lena Lumber Co. v. Brickhouse*, 173 Ark. 348, 292 S.W. 1007 (1927) (decision under prior law).

Liens.

Where the bond provided for is executed, parties having liens need not comply with § 18-44-114 or 18-44-117, as their remedy is on the bond. *Stewart-McGehee Constr. Co. v. Brewster & Riley Feed Mfg. Co.*, 171 Ark. 197, 284 S.W. 53 (1926) (decision under prior law).

Cited: *South Cent. Dist. of Pentecostal Church of God of Am., Inc. v. Bruce-Rogers Co.*, 269 Ark. 130, 599 S.W.2d 702 (1980).

18-44-506. Surety and conditions.

The bond required or authorized in this subchapter shall be executed by a solvent corporate surety company authorized to do business in the State of Arkansas. The bond shall be conditioned that the contractor shall faithfully perform his or her contract and shall pay all indebtedness for labor and materials furnished or performed in the repair, alteration, or erection.

History. Acts 1953, No. 351, § 4; 1957, No. 209, § 2; A.S.A. 1947, § 51-635.

CASE NOTES

ANALYSIS

Effect of Noncompliance.

Mistake.

Terms and Conditions.

Effect of Noncompliance.

If the contractor's bond does not follow the essential requirements prescribed by the statute, the contract is invalid. *Southern Sur. Co. v. Fort Smith Dist.*, 17 F.2d 63 (8th Cir. 1926) (decision under prior law).

Mistake.

A bond is not affected by a mistake in the naming of the obligee where it clearly appears that it was intended that the bond was taken pursuant to the statute. *Reiff v. Redfield School Bd.*, 126 Ark. 474, 191 S.W. 16 (1916) (decision under prior law).

Terms and Conditions.

The surety on a bond is presumed to know that the bond is executed as though the terms of the statute were a part thereof. *Reiff v. Redfield School Bd.*, 126 Ark. 474, 191 S.W. 16 (1916) (decision under prior law).

Former statute did not prohibit a surety from executing a bond expressly restricting its liability to the obligee, where the bond expressly negated the idea that it was executed in obedience to the former statute. *Fidelity & Deposit Co. v. Crane Co.*, 178 Ark. 676, 12 S.W.2d 872 (1928) (decision under prior law).

Where condition of bond provided for payment of "all indebtedness for labor and material furnished or performed by any person on the work contemplated by said contract" liability of surety was not limited to material actually entering into the

work or which might be the basis of a mechanic's lien. *Holcomb v. American Sur. Co.*, 184 Ark. 449, 42 S.W.2d 765 (1931) (decision under prior law).

A contractor's bond reciting an agreement of a school district to pay for material and labor for a school building was held not a statutory bond which would relieve the district from liability to materialmen. *East End School Dist. No. 2 v. Gaiser-Hill Lumber Co.*, 184 Ark. 1165, 45 S.W.2d 504 (1932) (decision under prior law).

A contractor's bond securing a school district against liability by reason of the contractor's failure to perform his contract

to pay for materials not indicating by its terms that it was intended to be in compliance with the former statute will not be treated as a statutory bond and action need not be brought within the former statutory period after completion of the improvement. *National Sur. Co. v. Standard Lumber Co.*, 186 Ark. 664, 54 S.W.2d 988 (1932) (decision under prior law).

Cited: *B. Sweetser Constr. Co. v. Newman Bros.*, 236 Ark. 939, 371 S.W.2d 515 (1963); *South Cent. Dist. of Pentecostal Church of God of Am., Inc. v. Bruce-Rogers Co.*, 269 Ark. 130, 599 S.W.2d 702 (1980); *River Valley, Inc. v. American States Ins. Co.*, 287 Ark. 386, 699 S.W.2d 745 (1985).

18-44-507. Filing.

Before any work is performed under the contract, the bond shall be filed with the clerk of the circuit court of the county in which the repairs, alterations, or erection of any building, structure, or improvements are made.

History. Acts 1953, No. 351, § 6; A.S.A. 1947, § 51-637.

CASE NOTES

Cited: *Beebe School Dist. v. National Supply Co.*, 280 Ark. 340, 658 S.W.2d 372 (1983).

18-44-508. Actions — Limitations.

(a) All persons, firms, associations, and corporations who have valid claims against the bond may bring an action thereon against the corporate surety.

(b) No action shall be brought on the bond after six (6) months from the date final payment is made on the contract, nor outside the State of Arkansas.

History. Acts 1953, No. 351, § 5; A.S.A. 1947, § 51-636.

Cross References. Actions on bonds, § 16-107-201 et seq.

CASE NOTES

ANALYSIS

Contractual Limitations.
Final Payment.
Parties.

Contractual Limitations.

Where contractual limitation in a contractor's bond provided a shorter time limitation than this section provided, the longer statutory period was controlling.

Hartford Accident & Indem. Co. v. Stewart Bros. Hdwe. Co., 285 Ark. 352, 687 S.W.2d 128 (1985).

Final Payment.

The final payment as used in this section means the last payment and where a retainage is retained the payment of less than 100% on the finish of the contracted construction would not constitute the final payment within the meaning of this section; the limitation for an action on the bond would run from the date of the payment of the amount retained. Tucker Paving Corp. v. Armco Steel Corp., 242 Ark. 49, 411 S.W.2d 888 (1967).

Interim payment made on a contract

was not a final payment within meaning of this section and supplier of construction materials was not, therefore, bringing suit under a performance bond where the suit was not filed within six months from the date such interim payment was made. Credit Gen. Ins. Co. v. Atlas Asphalt, Inc., 304 Ark. 522, 803 S.W.2d 903 (1991).

Parties.

Contractor was not a necessary party in suit. Holcomb v. American Sur. Co., 184 Ark. 449, 42 S.W.2d 765 (1931) (decision under prior law).

Cited: United States v. Trigg, 465 F.2d 1264 (8th Cir. 1972).

CHAPTER 45

ARTISAN'S AND REPAIRMEN'S LIENS

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. BLACKSMITHS, VEHICLE REPAIRMEN, ETC.
3. ELECTRICAL REPAIRMEN.
4. CLEANERS, LAUNDERERS, ETC.

RESEARCH REFERENCES

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Ark. L. Notes. Copeland, Recent Arkansas Cases Involving Article Nine of the U.C.C., 1995 Ark. L. Notes 31.

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Estoppel to Assert an After Acquired Title in Arkansas, 17 Ark. L. Rev. 67.

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Creditors' Provisional Remedies and Debtors' Due Process Rights: Statutory Liens in Arkansas, 32 Ark. L. Rev. 185.

Nickles, A Localized Treatise on Secured Transactions — Part 1: Scope of Article 9, 34 Ark. L. Rev. 377.

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U. Ark. Little Rock L.J. Maltz, State Action and Statutory Liens in Arkansas — A Reply to Professor Nickles, 2 U. Ark. Little Rock L.J. 357.

Nickles, State Action and Statutory Liens in Arkansas — A Rejoinder to Professor Maltz, 2 U. Ark. Little Rock L.J. 369.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

18-45-101. Right of mechanics and arti-

sans to sell personalty held for debt.

Effective Dates. Acts 1899, No. 58,
§ 4: effective on passage.

18-45-101. Right of mechanics and artisans to sell personalty held for debt.

(a) All mechanics and artisans who are in possession of articles of personal property, and hold them by virtue of a lien thereon for labor and material, shall have a right to sell them for the satisfaction of the debt for which the property is held.

(b) Lienholders shall give a bond in the sum to be fixed by a justice of the peace or circuit judge before they shall proceed to sell, by proceeding in accordance with the requirements of this section.

(c)(1) The sale shall not take place until the expiration of thirty (30) days from the time the work is completed.

(2)(A) If the debt is not paid at the end of that time, it shall be the duty of the lienholder, not less than ten (10) days before making the sale, to post up a written notice of the proposed sale at or near the front of his or her place of business, or, in case he or she has no place of business, at five (5) of the most public places in the township.

(B) This notice of the proposed sale shall specify the property to be sold, the name of the owner or debtor, and the time and place of sale.

(C) The notice shall be signed by the lienholder.

(d) At the sale, which shall be at public auction for cash, the lienholder shall have the right to bid not less than the amount of his or her debt. In case the property sells for more than the amount due, he or she shall pay over the surplus on demand to the person entitled thereto.

(e) In case the place of residence or post office address of the debtor is known to the lienholder, it shall be his or her duty, besides giving the notice as required in subsection (c) of this section, to make demand for the debt before making the sale, either in person or by letter.

(f) In all the lienholder's dealings with the property held by him or her, the lienholder shall act in good faith with the debtor and shall be responsible for any abuse of the powers and authority vested in him or her by the provisions of this section.

History. Acts 1899, No. 58, §§ 1-3, p. 108; C. & M. Dig., §§ 6875-6877; Pope's Dig., §§ 8831-8833; A.S.A. 1947, §§ 51-401 — 51-403.

Cross References. Mechanics liens, § 18-44-101 et seq.

CASE NOTES

Wheelwrights.

Former law governing liens of wheelwrights covered the whole subject and this section was not applicable to wheelwright's liens. *Shelton v. Little Rock Auto Co.*, 103 Ark. 142, 146 S.W. 129 (1912).

Cited: *Goff-McNair Motor Co. v. Phillips Motor Co.*, 226 Ark. 751, 294 S.W.2d 342 (1956).

SUBCHAPTER 2 — BLACKSMITHS, VEHICLE REPAIRMEN, ETC.

SECTION.

- 18-45-201. Right to absolute lien.
- 18-45-202. Priority of lien.
- 18-45-203. Right of sale.
- 18-45-204. Procedure for sale of property possessed by lienholder.
- 18-45-205. Filing of notice and bond required.

SECTION.

- 18-45-206. Filing of lien when lienholder parts with possession.
- 18-45-207. Suits to enforce liens — Attachment.

Effective Dates. Acts 1919, No. 140, § 10: Feb. 27, 1919. Emergency declared. Acts 1923, No. 252, § 2: effective 90 days after adjournment of legislature.

Acts 1953, No. 77, § 2: approved Feb. 17, 1953. Emergency clause provided: "This act being necessary for the protection of the public peace, health and safety, shall take effect and be in force from and after its passage."

Acts 1963, No. 112, § 2: Feb. 28, 1963. Emergency clause provided: "It has been found and is hereby declared by the General Assembly of the State of Arkansas that there is no procedure by which a motor vehicle repairman who has surrendered possession of a repaired motor vehicle may enforce a lien against such vehicle when it is owned by a nonresident of the State of Arkansas; that the lack of such procedure is depriving motor repairmen of the remedy afforded them against residents of this State, and that enactment of this bill will alleviate this situation. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public

peace, health and safety, shall be in full force and effect from and after the date of its passage and approval."

Acts 1999, No. 695, § 5: Mar. 17, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that current laws regarding blacksmiths' liens and liens of vehicle repairmen are vague and indefinite in certain applications; that the vagueness of those laws results in disagreement and litigation; that this act is designed to clarify such laws and should be given effect immediately to avoid further confusion and disagreement. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

CASE NOTES

Compliance.

Strict compliance with the statute creating the lien is required to preserve lien.

L. O. Umsted Auto Co. v. Edwards, 159 Ark. 327, 251 S.W. 878 (1923).

18-45-201. Right to absolute lien.

All blacksmiths, horseshoers, wheelwrights, automobile repairmen, airplane repairmen, machine shops, farm implement repairmen, automotive storagemen, firms, and corporations who perform, or have performed, work or labor for any person, firm, or corporation, who have

furnished any materials or parts for the repair of any vehicle or farm implement, including tires and all other motor accessories and bodies for automobiles, trucks, tractors, airplanes, and all other motor propelling conveyances, or who store on their premises any automobile, truck, tractor, airplane, or other automotive vehicle, if unpaid, shall have an absolute lien upon the product or object of their labor, repair, or storage and upon all wagons, carriages, automobiles, trucks, tractors, airplanes, farm implements, and other articles repaired or stored and all horses or other animals shod by them, for the sums of money due for their work, labor, storage, and for materials furnished by them and used in the product, the shoeing and repairing, including the furnishing of tires and all other accessories and bodies for automobiles, trucks, tractors, airplanes, and all other motor-propelled vehicles.

History. Acts 1919, No. 140, § 1, p. 123; C. & M. Dig., § 6866; Pope's Dig., § 8822; Acts 1963, No. 159, § 1; 1965, No. 458, § 1; A.S.A. 1947, § 51-404.

Cross References. Liens for motor vehicle storage, § 18-48-401 et seq.

Liens on animals, §§ 18-48-101 et seq., 18-48-201 et seq., 18-48-301 et seq.

RESEARCH REFERENCES

Ark. L. Notes. Brill, Equity and the Restitutionary Remedies: Constructive

Trust, Equitable Lien, and Subrogation, 1992 Ark. L. Notes 1.

CASE NOTES

ANALYSIS

Constitutionality.
Bona Fide Purchasers.
Common Law Lien.
Nonpayment.
Possession.
Property Subject to Lien.
Wheelwrights.

Constitutionality.

Due to the distinction between private parties who utilize overt assistance from state officials and private parties who do not make use of state officials when relying on statutory remedies for settling a dispute, repairmen's lien laws are not unconstitutional for violating federal due process requirements. *Leonards v. E.A. Martin Mach. Co.*, 321 Ark. 239, 900 S.W.2d 546 (1995).

Bona Fide Purchasers.

Where at the commencement of the debtors' bankruptcy case, auto repairman's lien was perfected by his possession of the vehicle, the lien could not be avoided by the debtors. As long as the vehicle remained in the possession of the

repairman, there could be no bona fide purchaser; any potential purchaser at the commencement of the case could not have obtained the vehicle without the repairman relinquishing possession and asserting his lien. *Scott v. Becker*, 88 B.R. 196 (Bankr. E.D. Ark. 1988).

Common Law Lien.

The right to a common law lien for a mechanic repairing an automobile has been superseded. *Bond v. Dudley*, 244 Ark. 568, 426 S.W.2d 780 (1968).

Nonpayment.

Negligent termination of a bailment of automobile left for repairs by bailee, who was not obligated to terminate the bailment because of nonpayment, could result in liability for injuries suffered when a person to whom the bailor subsequently loaned the vehicle ran into plaintiff. *Murray ex rel. Murray v. Whit Tatum Motors, Inc.*, 673 F. Supp. 981 (W.D. Ark. 1987).

Possession.

Failure of an automobile repairman to surrender a car upon refusal of the owner to pay or tender charges for repairs did not constitute conversion. *Beloate v. Car-*

ruthers Motor Co., 168 Ark. 245, 269 S.W. 573 (1925).

The repairman has no right to retain possession of the car against the demand for possession of the vendor under a conditional sale contract, the purchase money not having been fully paid. Corning Motor Co. v. White, 173 Ark. 144, 293 S.W. 46 (1927).

In an owner's action seeking recovery of an all-terrain vehicle (ATV), a monetary award in favor of a wrecker service was erroneous because the wrecker service's liens under this section and § 18-48-402 were satisfied upon receipt of the sum generated from the sale of the ATV and its lack of perfection of its lien under § 27-50-1208 precluded a finding of a possessory lien. Payne v. Donaldson, 2010 Ark. App. 255, 379 S.W.3d 22 (2010).

Property Subject to Lien.

Welder who built model cutter and attached it to mower-tractor did not have a lien on the mower-tractor for cost of model cutter. Strange v. Corley, 221 Ark. 316, 253 S.W.2d 337 (1952).

Wheelwrights.

Former similar statute in providing for the enforcement of wheelwright's liens covered the whole subject and § 18-45-101 was not applicable to wheelwright's liens. Shelton v. Little Rock Auto Co., 103 Ark. 142, 146 S.W. 129 (1912) (decision under prior law).

Cited: Terrell v. Loomis, 218 Ark. 296, 235 S.W.2d 961 (1951); J.I. Case Co. v. Seabaugh, 10 Ark. App. 186, 662 S.W.2d 193 (1983); Herringer v. Mercantile Bank, 315 Ark. 218, 866 S.W.2d 390 (1993).

18-45-202. Priority of lien.

(a) The lien provided for in this subchapter shall take precedence over, and be superior to, any mortgage or other obligation attaching against the property in all cases in which the holder of the mortgage or other obligation shall permit the property to remain in the possession of and be used by the person owing and bound for the amount thereof.

(b) The lien provided for in this subchapter shall be subject to the perfected lien of a financial institution or vendor of automobiles, trucks, tractors, and all other motor-propelled conveyances for any claim for balance of purchase money due thereon.

(c) The lien shall not take precedence over a bona fide purchaser for value of any automobile, truck, tractor, and other motor-propelled conveyances without either actual or constructive notice.

History. Acts 1919, No. 140, § 9, p. § 8830; A.S.A. 1947, § 51-412; Acts 1999, 123; C. & M. Dig., § 6874; Pope's Dig., No. 695, § 1.

CASE NOTES

ANALYSIS

Construction.
Applicability.
Bona Fide Purchasers.
Purchase Money Mortgage.
Vendor's Liens.

Construction.

Vendor's lien on a motor vehicle held subordinate to a mechanic's lien on the same vehicle where the vendor failed to retain title to the vehicle as required by

§ 18-45-202(b), even though such action is prohibited by § 27-14-903. Bokker v. Hill, 327 Ark. 742, 940 S.W.2d 852 (1997).

Section 27-14-903, which makes retention of title a Class C misdemeanor, is directly at odds with § 18-45-202(b), which grants priority to a vendor only if the vendor keeps possession of the title; however, § 27-14-903(d) provides that it is not intended to limit the rights of a lienholder to perfect or record his security interest. Bokker v. Hill, 327 Ark. 742, 940 S.W.2d 852 (1997).

Applicability.

This section has no application where the only question is which, if either, of two sellers of chattels, both retaining title for payment of the purchase price, shall be preferred to the other. *Motor Credit Co. v. Smith*, 181 Ark. 127, 24 S.W.2d 974 (1930).

Bona Fide Purchasers.

Repairman could not recover from subsequent purchaser of tractor who had no actual or constructive notice of repair bill at time of sale. *Kern-Limerick, Inc. v. Emerson*, 214 Ark. 780, 218 S.W.2d 78 (1949).

Where at the commencement of the debtors' bankruptcy case, auto repairman's lien was perfected by his possession of the vehicle, the lien could not be avoided by the debtors. As long as the vehicle remained in the possession of the repairman, there could be no bona fide purchaser; any potential purchaser at the commencement of the case could not have obtained the vehicle without the repairman relinquishing possession and asserting his lien. *Scott v. Becker*, 88 B.R. 196 (Bankr. E.D. Ark. 1988).

Purchase Money Mortgage.

An automobile repairman has a lien upon an automobile superior to a lien of a mortgagee under a mortgage given to secure payment of all or part of the purchase price, as such a mortgagee is not in the same class as one who retains title as security for purchase money. *Commercial Credit Co. v. Hayes-Lamb Motor Co.*, 174 Ark. 945, 298 S.W. 217 (1927).

Vendor's Liens.

The vendor's lien is superior to an after-acquired mechanic's lien. *Powell v. Pacific Fin. Corp.*, 216 Ark. 884, 227 S.W.2d 965 (1950).

Lien for auto parts and labor was subject to vendor's lien by reason of the title retained by seller in the conditional sales contract pending payment of balance of purchase price. *Terrell v. Loomis*, 218 Ark. 296, 235 S.W.2d 961 (1951).

The lien rights of a holder of retained title for sale of an automobile are superior to mechanic's lien on the vehicle notwithstanding that the vendee who orders the work may have obtained possession of the car from the mechanic without his knowledge or consent. *Goff-McNair Motor Co. v. Phillips Motor Co.*, 226 Ark. 751, 294 S.W.2d 342 (1956).

The lien created by this subchapter does not have priority over the lien of the vendor of an automobile retaining title therein for the balance of purchase money owing thereon. *Bond v. Dudley*, 244 Ark. 568, 426 S.W.2d 780 (1968).

Where the truck ordered to be sold to satisfy a repairman's lien had been subject to a finance company's perfected security interest when brought into the state, the interest acquired by the buyer at the judicial sale was subject to the finance company's vendor's lien. *Mack Fin. Corp. v. Chrestman*, 270 Ark. 396, 605 S.W.2d 749 (1980).

Cited: *Herringer v. Mercantile Bank*, 315 Ark. 218, 866 S.W.2d 390 (1993); *Bokker v. Hill*, 327 Ark. 742, 940 S.W.2d 852 (1997).

18-45-203. Right of sale.

Any person, firm, or corporation having a lien under the provisions of this subchapter and retaining possession of the wagon, carriage, automobile, truck, tractor, airplane, motor-propelled conveyance, or other article repaired, or on horses or other animals shod by them, by virtue of the lien thereon for labor or materials, shall have the right to sell those items for the satisfaction of the debt for which the property is held.

History. Acts 1919, No. 140, § 2, p. 123; C. & M. Dig., § 6867; Pope's Dig., § 8823; Acts 1963, No. 159, § 2; A.S.A. 1947, § 51-405.

CASE NOTES

Bona Fide Purchasers.

Where at the commencement of the debtors' bankruptcy case, auto repairman's lien was perfected by his possession of the vehicle, the lien could not be avoided by the debtors. As long as the vehicle remained in the possession of the

repairman, there could be no bona fide purchaser; any potential purchaser at the commencement of the case could not have obtained the vehicle without the repairman relinquishing possession and asserting his lien. *Scott v. Becker*, 88 B.R. 196 (Bankr. E.D. Ark. 1988).

18-45-204. Procedure for sale of property possessed by lienholder.

(a)(1) The sale shall not take place until the expiration of thirty (30) days from the time the work is completed.

(2)(A) If the debt is not paid at the end of that time, it shall be the duty of the lienholder, not less than ten (10) days before making the sale, to post up written notice of the proposed sale at or near the front door of his or her place of business and at least five (5) other of the most public places in the township.

(B) This written notice of the proposed sale shall specify the property to be sold, the name of the owner or debtor, the time and place of sale, and shall be signed by the lienholder.

(b)(1) At the sale, which shall be at public auction for cash to the highest and best bidder, the lienholder shall have the right to bid not less than the amount of his or her debt.

(2) In case the property sells for more than the amount of the debt, the lienholder shall pay over the surplus on demand to the person entitled thereto after deducting the amount of his or her debt and the actual cost of the sale.

(c) It shall be the duty of the lienholder, besides giving notice as required in subsection (a) of this section, to make demand for the debt before making the sale by registered letter addressed to the last known residence or post office address of the debtor.

(d) In the lienholder's dealings with the property held by him or her, the lienholder shall act in good faith with the debtor and shall be responsible for any abuse of the power and authority vested in him or her by the provisions of this subchapter.

(e) The provisions of § 27-50-1101 shall govern sales of vehicles subject to the registration laws of this state.

History. Acts 1919, No. 140, §§ 3, 4, p. 123; C. & M. Dig., §§ 6868, 6869; Pope's Dig., §§ 8824, 8825; A.S.A. 1947, §§ 51-406, 51-407; Acts 1997, No. 841, § 5.

18-45-205. Filing of notice and bond required.

(a)(1) The lienholder shall file with one (1) of the justices of the peace in the township where his or her place of business is located a notice similar to the ones required in § 18-45-204 to be posted.

(2) The justice shall note upon the notice the amount of a bond for the protection of the debtor or property owner in the event the lienholder is

not entitled to the lien and for the payment of any damages if the sale is wrongfully made.

(b) The lienholder shall file a bond so conditioned and in such sum with the justice of the peace, and the surety thereon shall be approved by the justice of the peace before making the sale provided for in this subchapter.

History. Acts 1919, No. 140, § 5, p. 123; C. & M. Dig., § 6870; Pope's Dig., § 8826; A.S.A. 1947, § 51-408.

18-45-206. Filing of lien when lienholder parts with possession.

(a)(1) If the lienholder has voluntarily parted with possession of any property upon which he or she has a lien under the provisions of this subchapter, he or she may still avail himself or herself of the lien within one hundred twenty (120) days after the work or labor is done or performed or materials furnished.

(2) This may be done by filing with the clerk of the circuit court of the county in which the debtor resides, or, if the debtor is a nonresident of this state, then with the clerk of the circuit court of the county in which the property is located at the time of the filing, a just and true itemized account for the demand due, after allowing all credits, containing a description of the property to be charged with the lien and verified by the affidavit of the lienholder.

(b) The time set out in this section for filing liens shall apply only to motor-propelled vehicles and shall not affect the time for filing liens in other cases as now provided by law.

(c) The clerk of the circuit court shall file the account and make an abstract of it in the book of minutes of mortgages and deeds of trust of personal property, for which he or she shall charge a fee of twenty-five cents (25¢), to be paid by the person filing the account.

History. Acts 1919, No. 140, §§ 6, 7, p. 123; C. & M. Dig., §§ 6871, 6872; Pope's Dig., §§ 8827, 8828; Acts 1961, No. 462, § 1; 1963, No. 112, § 1; A.S.A. 1947, §§ 51-409, 51-410.

CASE NOTES

ANALYSIS

Bona Fide Purchasers.
Contents of Account.
Estoppel.
Limitation of Actions.
Place of Filing.

Bona Fide Purchasers.

Plaintiff could not recover where lien was filed after sale to bona fide purchaser for value who had no actual or constructive notice of repair bill at time of sale.

Kern-Limerick, Inc. v. Emerson, 214 Ark. 780, 218 S.W.2d 78 (1949).

Where at the commencement of the debtors' bankruptcy case, auto repairman's lien was perfected by his possession of the vehicle, the lien could not be avoided by the debtors. As long as the vehicle remained in the possession of the repairman, there could be no bona fide purchaser; any potential purchaser at the commencement of the case could not have obtained the vehicle without the repairman relinquishing possession and assert-

ing his lien. *Scott v. Becker*, 88 B.R. 196 (Bankr. E.D. Ark. 1988).

Contents of Account.

Account which merely listed credits, debits and dates was insufficient to establish lien since claimant was required to file an itemized statement describing work performed and items furnished for use in the truck. *Taylor v. Crouch*, 219 Ark. 858, 245 S.W.2d 217 (1952).

Estoppel.

In a suit to collect a repair bill, the defendant company could not deny its agent's authority to have a car repaired where the repairman had been induced by the company to believe there was authority, and relying upon that belief, the repairman accepted the company's credit and neglected to file a lien. *Thompson v. Collier-Reynolds Grocery Co.*, 155 Ark. 355, 244 S.W. 355 (1922).

Limitation of Actions.

The statutory period begins to run from date of last debit item on account and not from date of last payment on the account.

Terrell v. Loomis, 218 Ark. 296, 235 S.W.2d 961 (1951).

Where there was no contract for continuing repair of machine but there had been three separate repair jobs on such machine, each separate and complete in itself, and lien claim was filed within the statutory period from the last repair job but at a greater period from the earlier repair jobs, recovery could be had only for the last repair job and not for the two preceding jobs. *Crump & Rodgers Co. v. Southern Implement Co.*, 229 Ark. 285, 316 S.W.2d 121 (1958).

Where account was not filed with the circuit clerk within the statutory period after the work was done, the complaint did not allege a valid lien. *Brittain v. Mammoth Spring Motor Co.*, 233 Ark. 468, 345 S.W.2d 373 (1961).

Place of Filing.

This section contemplates that a lien shall be filed in the county of the debtor's home, not in the county where he may be visiting. *L. O. Umsted Auto Co. v. Edwards*, 159 Ark. 327, 251 S.W. 878 (1923).

18-45-207. Suits to enforce liens — Attachment.

(a) Liens accruing under this subchapter may be enforced at any time within eighteen (18) months after the accounts are filed by suits in the circuit or district court.

(b)(1) If the lienholder has parted with possession of any property upon which he or she claims a lien under the provisions of § 18-45-201, he or she may, at the time of institution of his or her suit, have a specific attachment of the property upon which he or she claims the lien by praying for it in his or her complaint and by providing bond in the manner and amount as otherwise provided by law for attachment.

(2) The establishment of a valid lien at the hearing of the cause shall be grounds for sustaining the attachment.

History. Acts 1919, No. 140, § 8, p. 123; C. & M. Dig., § 6873; Acts 1923, No. 252, § 1; Pope's Dig., § 8829; Acts 1951, No. 271, § 1; 1953, No. 77, § 1; A.S.A. 1947, § 51-411; Acts 2003, No. 1185, § 253.

CASE NOTES

Constitutionality.

This section is not an attempt to confer equity jurisdiction upon justice of the peace courts and is not in conflict with the Arkansas Constitution or beyond the power of the legislature to provide, so long

as the amount sued for is within the limitation placed on such courts by the Arkansas Constitution. *Paragould Motor Co. v. McDonald*, 184 Ark. 52, 41 S.W.2d 976 (1931).

SUBCHAPTER 3 — ELECTRICAL REPAIRMEN**SECTION.**

18-45-301. Right of lien.

18-45-302. Lien priority.

18-45-303. Right of sale.

18-45-304. Selling of property kept by
lienholder.**SECTION.**

18-45-305. Enforcement of lien if possession not retained.

18-45-301. Right of lien.

Any person, firm, or corporation engaged in the business of repairing, rewinding, or rebuilding of electric motors, transformers, generators, and other electrical equipment who shall perform any work or labor on any object, thing, material, or property in connection with the businesses mentioned in this section shall have an absolute lien on the object, thing, material, or property for the full amount of the work or labor done or performed and material furnished.

History. Acts 1939, No. 61, § 1; A.S.A. 1947, § 51-413.

CASE NOTES

Cited: In re Taylor Oak Flooring Co., 87 F. Supp. 6 (W.D. Ark. 1949).

18-45-302. Lien priority.

If any person, firm, or corporation entitled to a lien under the provisions of this subchapter shall notify, by registered mail at the last known place of address, any person, firm, or corporation holding a mortgage or a lien against the property before the work or labor is done, and within ten (10) days after mailing the notice receives no response or objection to the performance of the work or labor, then, in that event, the lien provided for in this subchapter shall take precedence over, and be superior to, any mortgage or lien held by any person so notified who makes no objection to the performance of the work or labor.

History. Acts 1939, No. 61, § 4; A.S.A. 1947, § 51-416.

18-45-303. Right of sale.

Any person, firm, or corporation having a lien under the provisions of § 18-45-301 and retaining possession of the object, thing, or property serviced or repaired shall have the right to sell it for the satisfaction of the lien.

History. Acts 1939, No. 61, § 2; A.S.A. 1947, § 51-414.

Cross References. Notice of sale un-

der laborer's lien, §§ 18-43-107, 18-43-108.

18-45-304. Selling of property kept by lienholder.

(a)(1) The sale shall not take place until the expiration of ninety (90) days from the time the work is completed.

(2) If the debt is not paid at the end of that time, it shall be the duty of the lienholder, not less than ten (10) days before making the sale, to address a letter by registered mail to the last known place of address of the owner of the property or the person who ordered the property repaired.

(3) In addition, the lienholder shall give notice of the time and place and terms of sale in the same manner as now provided by law for the giving of notice for sale of property under labor liens.

(b)(1) The property may then be sold at public auction for cash to the highest and best bidder. The lienholder shall have the right to bid not less than the amount of his or her debt.

(2) If the property sells for more than the amount of the debt, the lienholder shall be liable for, and shall pay, any surplus to the person entitled thereto, after deducting the amount of his or her debt and the actual costs of the sale.

History. Acts 1939, No. 61, § 2; A.S.A. 1947, § 51-414.

18-45-305. Enforcement of lien if possession not retained.

(a) If the lienholder has voluntarily parted with possession of any property upon which he or she has a lien under the provisions of this subchapter, he or she may still avail himself or herself of a lien by filing a just and true itemized account within ninety (90) days after the work or labor is performed or material furnished with the clerk of the circuit court of the county in which the property is located.

(b) The clerk of the circuit court shall file the account and make an abstract of it in the proper lien record book, and the clerk may charge a fee of twenty-five cents (25¢) for the service.

(c)(1) The lien provided for in this subchapter may be enforced at any time within ninety (90) days after the filing of the lien.

(2) The enforcement of such liens shall be by suits in the circuit court of the county in which the property is located.

History. Acts 1939, No. 61, § 3; A.S.A. 1947, § 51-415.

SUBCHAPTER 4 — CLEANERS, LAUNDERERS, ETC.

SECTION.

18-45-401. Absolute lien.

18-45-402. Priority.

18-45-403. Right to sell.

18-45-404. Proceedings to sell property retained by lienholder.

SECTION.

18-45-405. Filing and enforcing when lienholder not in possession.

Effective Dates. Acts 1939, No. 98, § 7: approved Feb. 17, 1939. Emergency declared.

18-45-401. Absolute lien.

Cleaners, launderers, dyers, tailors, hat renovators, and shoe repairers, whether individuals, firms, or corporations, who perform work and labor on any object, thing, material, or property shall have an absolute lien on the object, thing, material, or property for the labor done and performed for the sum of money due for the work and labor.

History. Acts 1939, No. 98, § 1; A.S.A. 1947, § 51-417.

RESEARCH REFERENCES

Ark. L. Notes. Brill, Equity and the Trust, Equitable Lien, and Subrogation, Restitutionary Remedies: Constructive 1992 Ark. L. Notes 1.

18-45-402. Priority.

(a) The lien provided for in this subchapter shall take precedence over, or be superior to, any mortgage or other obligation attaching against the property in all cases in which the holder of the mortgage or other obligation shall permit the property to remain in the possession and be used by the person owing and bound for the amount thereof.

(b) The lien shall not take precedence over a bona fide purchaser for value of any such property without either actual or constructive notice.

History. Acts 1939, No. 98, § 6; A.S.A. 1947, § 51-422.

18-45-403. Right to sell.

Any person, firm, or corporation having a lien under the provisions of this subchapter and retaining possession of the object, thing, material, or property serviced or repaired by them shall have the right to sell it for the satisfaction of the lien subject to the provisions of this subchapter.

History. Acts 1939, No. 98, § 2; A.S.A. 1947, § 51-418.

18-45-404. Proceedings to sell property retained by lienholder.

(a)(1) The sale shall not take place until the expiration of ninety (90) days from the time the work is completed.

(2)(A) If the debt is not paid at the end of that time, it shall be the duty of the lienholder, not less than ten (10) days before making the

sale, to post up written notice of the proposed sale at or near the front door of his or her place of business.

(B) This written notice of the proposed sale shall specify the property to be sold, the name of the debtor, and the time and place of sale. The sale shall be at public auction for cash to the highest and best bidder.

(b) The lienholder shall have the right to bid not less than the amount of his or her debt. In case the property sells for more than the amount of the debt, the lienholder shall pay over any surplus on demand to the person entitled thereto, after deducting the amount of his or her debt and the actual cost of the sale.

(c) It shall be the duty of the lienholder, besides giving notice as required in subsection (a) of this section, to make demand for the debt before making the sale by registered letter addressed to the last known residence or post office of the debtor.

(d) In the lienholder's dealings with the property held by him or her, the lienholder shall act in good faith to the debtor.

History. Acts 1939, No. 98, §§ 3, 4;
A.S.A. 1947, §§ 51-419, 51-420.

18-45-405. Filing and enforcing when lienholder not in possession.

(a)(1) If the lienholder has voluntarily parted with possession of any property upon which he or she has a lien under the provisions of this subchapter, he or she may still avail himself or herself of the lien within ninety (90) days after the work or labor is done or performed, or materials furnished.

(2) This may be done by filing, with the clerk of the circuit court of the county in which the debtor resides, a just and true itemized account for the demand due after allowing all credits and containing a description of the property to be charged with the lien, verified by the affidavit of the lienholder.

(b)(1) The clerk of the circuit court shall file the account and make an abstract of it in the book of minutes or mortgages and deeds of trust of personal property.

(2) For this the clerk shall charge a fee of twenty-five cents (25¢) to be paid by the person filing the account and the fee shall be a part of the costs of the enforcement of the lien.

(c) Liens as provided by this section may be enforced at any time within four (4) months after the accounts are filed, by suits in the circuit courts of the county. The cause shall proceed to judgment and final disposition as other matters of equitable cognizance and jurisdiction.

History. Acts 1939, No. 98, § 5; A.S.A.
1947, § 51-421.

CHAPTER 46

MEDICAL, NURSING, HOSPITAL, AND AMBULANCE SERVICE LIEN ACT

SECTION.

- 18-46-101. Title.
- 18-46-102. Definitions.
- 18-46-103. Attorney's liens not affected.
- 18-46-104. Extent of lien.
- 18-46-105. Notice required — Contents
— Service — Amendments
and supplements.
- 18-46-106. Liens void after certain day
unless action commenced.
- 18-46-107. Enforcement of perfected liens
— Parties.
- 18-46-108. Liens assignable — Enforce-
ment.
- 18-46-109. Subrogation of rights.

SECTION.

- 18-46-110. Persons under legal disability.
- 18-46-111. Incorporation of lien in action
by patient.
- 18-46-112. Settlement of patient's claim
without satisfaction of lien
prohibited.
- 18-46-113. Waiver or release of claim by
patient.
- 18-46-114. Release on satisfaction or
waiver of lien required.
- 18-46-115. Records of liens and releases.
- 18-46-116. Receipt and payment of money
by court.
- 18-46-117. Pro rata payment of claims.

Effective Dates. Acts 1933, No. 130, § 17: effective on passage.

Acts 1971, No. 194, § 2: Mar. 2, 1971. Emergency clause provided: "It is hereby found and declared by the General Assembly that the treatment of human ailments includes practitioners of Dentistry and that there is an urgent need for their inclusion in the definition of practitioner

as provided in Act 130 of 1933 in order to enable practitioners of Dentistry to obtain benefits of said Act 130 of 1933. Therefore, an emergency is hereby declared to exist and this Act, being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

CASE NOTES

ANALYSIS

Construction.

Purpose.

Applicability.

Construction.

This chapter must be liberally construed to effectuate the purpose sought to be accomplished by its enactment. *Buchanan v. Beirne Lumber Co.*, 197 Ark. 635, 124 S.W.2d 813 (1939).

Purpose.

This chapter was enacted for the purpose of encouraging physicians, hospitals,

and nurses to extend their services and facilities to indigent persons who suffer personal injury through the negligence of another, by providing the best security available to assure compensation. *Buchanan v. Beirne Lumber Co.*, 197 Ark. 635, 124 S.W.2d 813 (1939).

Applicability.

This chapter creates a right of lien in personal injury cases only. *Buchanan v. Beirne Lumber Co.*, 197 Ark. 635, 124 S.W.2d 813 (1939).

18-46-101. Title.

This chapter may be cited as the Medical, Nursing, Hospital, and Ambulance Service Lien Act.

History. Acts 1933, No. 130, § 16; Pope's Dig., § 10833; A.S.A. 1947, § 51-815; Acts 1993, No. 271, § 1.

CASE NOTES

Cited: Fort Smith Serv. Fin. Corp. v. v. Linthicum, 743 F. Supp. 662 (W.D. Ark Parrish, 302 Ark. 299, 789 S.W.2d 723 1990). (1990); Provident Life & Accident Ins. Co.

18-46-102. Definitions.

As used in this chapter:

- (1) "Ambulance service provider" means a provider that renders services as defined in § 14-266-103(1) and (2);
- (2) "Claim" means the claim of a patient:
 - (A) For damages from a tortfeasor; or
 - (B) For benefits from an insurer;
- (3) "Hospital" means a person that maintains an establishment in which sick and injured persons are given medical and surgical care;
- (4) "Injury" means impairment of bodily, nervous, or mental integrity or health;
- (5) "Insurer" means a person that by a contract of insurance has undertaken to indemnify a patient against loss through injury resulting from accident or accidental means;
- (6) "Patient" means a person injured through the fault or neglect of another person, for the relief or cure of whose injury a practitioner, nurse, or hospital renders service;
- (7) "Person" means a natural person, a partnership, an association, or a corporation;
- (8) "Practitioner" means a person licensed to:
 - (A) Treat human ailments under the provisions of § 17-95-202 et seq.;
 - (B) Practice dentistry as defined in § 17-82-102;
 - (C) Practice chiropractic under the provisions of the Arkansas Chiropractic Practices Act, § 17-81-101 et seq.;
 - (D) Practice massage therapy under the Massage Therapy Act, § 17-86-101 et seq.; and
 - (E) Practice physical therapy under the Arkansas Physical Therapy Act, § 17-93-101 et seq.;
- (9) "Service" means personal service, food, lodging, ambulance service, medical supplies and appliances, and whatever else is reasonably necessary for the care, treatment, and maintenance of a patient; and
- (10) "Tortfeasor" means a person through whose fault or neglect a person is injured.

History. Acts 1933, No. 130, § 1; Pope's Dig., §§ 7989, 10818; Acts 1971, No. 194, § 1; A.S.A. 1947, § 51-801; Acts 1991, No. 1156, § 1; 1993, No. 271, § 2; 2001, No. 363, § 1; 2005, No. 1671, § 1.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2001 Arkansas General Assembly, Property Law, 24 U. Ark. Little Rock L. Rev. 549.

18-46-103. Attorney's liens not affected.

The liens given in this chapter shall in no way repeal or affect the statutory liens now provided in favor of attorneys.

History. Acts 1933, No. 130, § 18; Pope's Dig., § 10834; A.S.A. 1947, § 51-816.

18-46-104. Extent of lien.

On compliance with the requirements of this chapter, a practitioner, a nurse, a hospital, and an ambulance service provider shall each have a lien:

(1) For the value of the service rendered and to be rendered by the practitioner, nurse, hospital, or ambulance service provider to a patient, at the express or implied request of that patient or of someone acting on his or her behalf, for the relief and cure of an injury suffered through the fault or neglect of someone other than the patient himself or herself;

(2) On any claim, right of action, and money to which the patient is entitled because of that injury, and to costs and attorney's fees incurred in enforcing that lien.

History. Acts 1933, No. 130, § 2; Pope's Dig., §§ 7990, 10819; A.S.A. 1947, § 51-802; Acts 1993, No. 271, § 3.

RESEARCH REFERENCES

Ark. L. Notes. Brill, Equity and the Restitutionary Remedies: Constructive Trust, Equitable Lien, and Subrogation, 1992 Ark. L. Notes 1.

CASE NOTES

ANALYSIS

Applicability.

Full Amount of Lien Not Discharged.

Applicability.

Where an injured motor vehicle passenger received insurance benefits from his father's automobile insurer, \$25,000 for underinsured motorist-bodily injury coverage and \$5,000 for medical benefits,

such funds fell squarely within the language of this section and the hospital at which the passenger was treated was entitled to the funds. *Stuttgart Reg'l Med. Ctr. v. Cox*, 343 Ark. 209, 33 S.W.3d 142 (2000).

Full Amount of Lien Not Discharged.

Where hospital's assignee established lien pursuant to § 18-46-108 and received a pro rata share of settlement proceeds

pursuant to § 18-46-117, acceptance of amount less than full amount of the lien did not discharge the entire debt as court order apportioning settlement and extinguishing the lien did not raise or determine issue of debtor's liability on the entire debt, was not the equivalent of extinguishing the debt and did not bar

assignee, under the doctrine of *res judicata*, from seeking payment of the greater amount, and there was no agreement between the parties that acceptance of a lesser amount would operate as an accord and satisfaction of the debt. *Fort Smith Serv. Fin. Corp. v. Parrish*, 302 Ark. 299, 789 S.W.2d 723 (1990).

18-46-105. Notice required — Contents — Service — Amendments and supplements.

In order to establish a lien under this chapter, a practitioner, nurse, hospital, or ambulance service provider shall comply with the following conditions:

(1) NOTICE REQUIRED.

(A) The practitioner, nurse, hospital, or ambulance service provider shall serve on the patient a written notice of his or her claim of lien and shall serve a copy of that notice on the tortfeasor or on the insurer, if there is any, or, at the discretion of the practitioner, nurse, hospital, or ambulance service provider, or both. He or she shall file a copy of the notice so served in the office of the clerk of the circuit court in the county in which his or her professional, nursing, hospital, or ambulance service has been, or is being, rendered. The notice shall be authenticated by an affidavit to show that the notice and copies of it have been served as required by this chapter. This notice may be served and recorded at any time while service is being rendered and at any time after the discontinuance of service so long as the claim of the practitioner, nurse, hospital, or ambulance service provider for compensation for service is not barred by the statute of limitations.

(B) If, to the knowledge of the practitioner, nurse, hospital, or ambulance service provider, the patient against whose claim or right of action it is desired to establish a lien has instituted an action in any court in Arkansas to enforce his or her claim against the tortfeasor responsible for his or her injury, or against any insurer by which he or she was insured against loss through injury due to accident or accidental means, then the practitioner, nurse, hospital, or ambulance service provider may, in his or her or its discretion, in lieu of, or in addition to serving notice of his or her claim and recording the notice, as authorized by subdivision (1)(A) of this section, file a notice of his or her claim, duly authenticated under oath, in the court in which the action is pending. The filing of the notice of the claim shall be notice thereof to all parties to the action, without the serving of further notice of the recording of the copy of any notice in the office of the clerk of the circuit court.

(2) CONTENTS OF NOTICE.

(A) The notice required by this section shall show, so far as is known to the practitioner, nurse, hospital, or ambulance service provider on whose behalf it is filed or served:

(i) The name and address of the tortfeasor and, if a lien is claimed against an insurer, then the name and address of that insurer;

(ii) The name of the patient, his or her usual address, and his or her whereabouts when the notice is served, if elsewhere than at his or her usual address;

(iii) The name and address of the person claiming the lien, and whether he or she claims as a practitioner, nurse, hospital, or ambulance service provider;

(iv) The time when, place where, and circumstances under which the alleged fault or neglect of the tortfeasor occurred and the nature of the injury; and

(v) If the service of the practitioner, nurse, hospital, or ambulance service provider has been completed, the amount for which his or her lien is claimed.

(B) The notice shall be supported by an affidavit by the practitioner, nurse, hospital, or ambulance service provider showing that the facts stated of affiant's own knowledge are true, and that the facts stated on information and belief he or she believes to be true.

(C) If the professional, nursing, hospital, or ambulance service on which the claim of lien is based has not been completed when notice of the claim of lien is served and the amount for which a lien is claimed is not stated in the notice, then the practitioner, nurse, hospital, or ambulance service provider on whose behalf the notice has been served shall serve, within sixty (60) days after the termination of service, a supplementary notice on each person previously notified and file a notice in the court in which the previous notice was filed, showing the amount claimed under the lien.

(3) METHOD OF SERVICE OF NOTICE. Any notice required by this chapter to be served shall be deemed to have been served:

(A) If delivered to the person on whom it is to be served or left at his or her usual place of business or residence with some person of mature years employed or dwelling there; or

(B) If delivered by registered mail at the last known address of the person to be notified, either within or without the State of Arkansas, as shown by the receipt returned by the United States Postal Service and by an affidavit by an affiant having personal knowledge of the facts, showing that the notice required by this section to be served was enclosed in the letter for which the receipt was returned, when that letter was deposited in the mail.

(4) AMENDATORY AND SUPPLEMENTARY NOTICES. The fact that a practitioner, nurse, hospital, or ambulance service provider has filed a notice of the lien as authorized by this chapter shall not prevent his or her filing amendatory or supplementary notices of liens subsequently, but every amendatory and supplementary notice shall be served and filed in the same manner as the original notice.

History. Acts 1933, No. 130, § 3; Pope's Dig., §§ 7991, 10820; A.S.A. 1947, § 51-803; Acts 1993, No. 271, § 4.

CASE NOTES

ANALYSIS

Full Amount of Lien Not Discharged.
Recovery from Debtor's Bankruptcy Estate.

Full Amount of Lien Not Discharged.

Where hospital's assignee established lien pursuant to § 18-46-108 and received a pro rata share of settlement proceeds pursuant to § 18-46-117, acceptance of amount less than full amount of the lien did not discharge the entire debt as court order apportioning settlement and extinguishing the lien did not raise or determine issue of debtor's liability on the entire debt, was not the equivalent of extinguishing the debt and did not bar assignee, under the doctrine of *res judicata*, from seeking payment of the greater amount, and there was no agreement between the parties that acceptance of a lesser amount would operate as an accord

and satisfaction of the debt. *Fort Smith Serv. Fin. Corp. v. Parrish*, 302 Ark. 299, 789 S.W.2d 723 (1990).

Recovery from Debtor's Bankruptcy Estate.

Health center that filed a lien, pursuant to subdivision (1)(A) of this section, to recover the costs of services it provided to a debtor before the debtor declared Chapter 13 bankruptcy was entitled to recover its costs because the lien was in effect on the date the debtor declared bankruptcy and 11 U.S.C.S. § 108(c) tolled the time period the health center had under § 18-46-106(a) to enforce its lien. The health center had 30 days after it received notice of the termination or expiration of the automatic stay to enforce its lien, and it did that by filing a claim against the debtor's bankruptcy estate. *In re Miller*, 444 B.R. 177 (Bankr. E.D. Ark. 2011).

18-46-106. Liens void after certain day unless action commenced.

(a) If at the expiration of one hundred eighty (180) days immediately following the day on which the most recent notice, amendatory notice, or supplementary notice of a claim of lien was filed in the office of the clerk of the circuit court, as authorized by this chapter, and if, in any event, immediately on the expiration of the period during which the practitioner, nurse, hospital, or ambulance service provider can enter action to enforce his or her or its claim against the patient for compensation for service rendered, the lien remains unsatisfied and unreleased, and no suit by the practitioner, nurse, hospital, or ambulance service provider by which notice of the lien was filed to enforce that lien is pending in any court, then the lien shall be void and of no effect.

(b)(1) Any patient against whose claim or right of action any void lien exists may enforce that claim or right of action discharged from that lien, on delivering to the tortfeasor or insurer an affidavit showing that no action is pending against the affiant to enforce the lien claimed by the practitioner, nurse, hospital, or ambulance service provider.

(2) On filing a copy of that affidavit with the clerk of the circuit court in whose office notice of the lien was originally filed, the clerk shall enter on his or her docket and file a notation to show that the lien has lapsed and is void.

(c) If the amount claimed under any lien has been paid into court, as authorized by this chapter, remains in the custody of the court after the lien has become void, on application by the tortfeasor or the insurer by

which the money was so paid, supported by a copy of the record of the circuit court showing that the lien has lapsed, then the court may return the money to the person by whom it was deposited and give him or her judgment against the lienor for interest on the money during the time it was on deposit and for costs and a reasonable counsel fee.

(d) Any person who, in order to obtain the release of an alleged lapsed lien, makes a false affidavit and delivers a copy of it to any tortfeasor or insurer or files a copy of any such affidavit in the office of the clerk of the circuit court shall be guilty of perjury and subject to the penalties prescribed for that offense.

(e) If at the expiration of the one hundred eighty (180) days stated in subsection (a) of this section an action is pending by the practitioner, nurse, hospital, or ambulance service provider to enforce a claim of lien filed by him or her, the lien shall continue in full force and effect during the pendency of that suit, unless released by the practitioner, nurse, hospital, or ambulance service provider by whom the claim was filed.

History. Acts 1933, No. 130, § 7; Pope's 807; Acts 1993, No. 271, § 5; 1995, No. Dig., §§ 7995, 10824; A.S.A. 1947, § 51-790, § 1.

CASE NOTES

ANALYSIS

Effect of Failure to Obtain Lien.

Recovery from Debtor's Bankruptcy Estate.

Effect of Failure to Obtain Lien.

Hospital's failure to follow procedures set forth in the lien statute under this section did not extinguish a hospital debt or the hospital's right to collect for medical services; it simply resulted in the hospital not being able to assert a lien. *Alvarado v. St. Mary-Rogers Mem'l Hosp., Inc.*, 99 Ark. App. 104, 257 S.W.3d 583 (2007).

Recovery from Debtor's Bankruptcy Estate.

Health center that filed a lien, pursuant to § 18-46-105(1)(A), to recover the costs

of services it provided to a debtor before the debtor declared Chapter 13 bankruptcy was entitled to recover its costs because the lien was in effect on the date the debtor declared bankruptcy and 11 U.S.C.S. § 108(c) tolled the time period the health center had under subsection (a) of this section to enforce its lien. The health center had 30 days after it received notice of the termination or expiration of the automatic stay to enforce its lien, and it did that by filing a claim against the debtor's bankruptcy estate. *In re Miller*, 444 B.R. 177 (Bankr. E.D. Ark. 2011).

18-46-107. Enforcement of perfected liens — Parties.

(a)(1) A practitioner, nurse, hospital, or ambulance service provider that has perfected a lien under the provisions of this chapter to secure the payment of a debt for service rendered may enforce that lien by any proper action against the patient, the tortfeasor, and the insurer, jointly or severally, in any court of competent jurisdiction.

(2) However, no such action shall be begun after action on the debt itself is barred by the statute of limitations.

(b)(1) The plaintiff in any such case shall make any and all persons having interests in the subject matter of the action, of whose interest he or she has knowledge, parties defendant. Any person having an interest in the subject matter of the action who is not made a party to it may, with the consent of the court, become a party in order to protect his or her interest.

(2) Persons having an interest in the subject matter of the action include, within the meaning of this section, all persons authorized by this chapter to establish liens to secure their interests, those whose claims against the patients are not, as well as those whose claims against the patients are, due at the time of the commencement of the action.

(c) Any two (2) or more persons having liens on the same claim or right of action of any patient may join in bringing action setting forth their respective rights in their pleading.

(d) An action to which any practitioner, nurse, hospital, or ambulance service provider having a lien on the subject matter is a party shall not be dismissed without his or her consent.

History. Acts 1933, No. 130, § 10; Pope's Dig., §§ 7998, 10827; A.S.A. 1947, § 51-810; Acts 1993, No. 271, § 6.

18-46-108. Liens assignable — Enforcement.

(a) All liens or claims of liens that accrue to any practitioner, nurse, hospital, or ambulance service providers under this chapter are assignable.

(b) Proceedings to enforce assigned liens or claims of liens may be maintained by, and in the name of, the assignee. The assignee shall have as full and complete power to enforce the lien or claim of lien assigned to him or her as if proceedings to that end were taken under this chapter by and in the name of the assignor.

History. Acts 1933, No. 130, § 11; Pope's Dig., §§ 7999, 10828; A.S.A. 1947, § 51-811; Acts 1993, No. 271, § 7.

RESEARCH REFERENCES

Ark. L. Rev. Transmissibility of Certain Contingent Future Interests, 5 Ark. L. Rev. 111.

CASE NOTES

Full Amount of Lien Not Discharged.

Where hospital's assignee established lien pursuant to this section and received a pro rata share of settlement proceeds pursuant to § 18-46-117, acceptance of amount less than full amount of the lien

did not discharge the entire debt as court order apportioning settlement and extinguishing the lien did not raise or determine issue of debtor's liability on the entire debt, was not the equivalent of extinguishing the debt and did not bar

assignee, under the doctrine of *res judicata*, from seeking payment of the greater amount, and there was no agreement between the parties that acceptance of a

lesser amount would operate as an accord and satisfaction of the debt. *Fort Smith Serv. Fin. Corp. v. Parrish*, 302 Ark. 299, 789 S.W.2d 723 (1990).

18-46-109. Subrogation of rights.

Any person who, with the consent of a patient injured through the fault or neglect of another person, pays to a practitioner, nurse, hospital, or ambulance service provider the amount due for service to that patient shall be subrogated to the rights of the payee with respect to the establishment and enforcement of a lien under this chapter.

History. Acts 1933, No. 130, § 12; Pope's Dig., §§ 8000, 10829; A.S.A. 1947, § 51-812; Acts 1993, No. 271, § 8.

RESEARCH REFERENCES

Ark. L. Notes. Brill, *Equity and the Trust, Equitable Lien, and Subrogation, Restitutionary Remedies: Constructive* 1992 Ark. L. Notes 1.

18-46-110. Persons under legal disability.

If any person, because of minority, mental defect, death, or other legal disability, cannot exercise any right conferred on him or her by this chapter or discharge any duty imposed on him or her by it, that right may be exercised and that duty shall be discharged, by his or her father, mother, guardian, executor, or administrator, as the circumstances of the case require.

History. Acts 1933, No. 130, § 13; Pope's Dig., §§ 8001, 10830; A.S.A. 1947, § 51-813.

18-46-111. Incorporation of lien in action by patient.

If a patient has instituted an action in any court in Arkansas to enforce his or her claim against the tortfeasor through whose fault or neglect he or she was injured, or against any insurer by which he or she was insured against loss through accident or accidental means, and a practitioner, nurse, hospital, or ambulance service provider has filed in the court in which the action is pending a notice of his or her claim of lien, as authorized by this chapter, the court before which the action is pending shall have jurisdiction with respect to that claim of lien and shall embody in its judgment such an award with respect thereto as the evidence warrants.

History. Acts 1933, No. 130, § 4; Pope's Dig., §§ 7992, 10821; A.S.A. 1947, § 51-804; Acts 1993, No. 271, § 9.

18-46-112. Settlement of patient's claim without satisfaction of lien prohibited.

(a) A tortfeasor and an insurer, and each of them, who have been notified, as authorized by this chapter, of a claim of lien against any claim or right of action that a patient has against the tortfeasor or insurer by reason of an injury caused by the fault or neglect of a tortfeasor shall not, within sixty (60) days after the service of the notice, nor at any time after a copy of that notice has been recorded in the office of the clerk of the circuit court of the county in which the professional, nursing, hospital, or ambulance service was rendered, pay to the patient, either directly or indirectly, any money or deliver to him or her, either directly or indirectly, anything of value, in settlement or part settlement of the patient's claim or right of action, without having previously:

(1) Paid to the practitioner, nurse, hospital, or ambulance service provider that gave notice of the claim of lien the amount claimed under it; or

(2) Received a written release of the claim of lien from the practitioner, nurse, hospital, or ambulance service provider that gave notice of it, except as otherwise authorized by this chapter.

(b) A tortfeasor and an insurer, and either of them, that have been notified by a practitioner, nurse, hospital, or ambulance service provider of claim of lien under this chapter and who, directly or indirectly, otherwise than as is authorized by this chapter, pays to the patient any money or delivers to him or her anything of value as a settlement or compromise of the patient's claim arising out of the injury done to him or her shall be liable to the practitioner, nurse, hospital, or ambulance service provider for the money value of the service rendered by the practitioner, nurse, hospital, or ambulance service provider, in an amount not in excess of the amount to which the patient was entitled from the tortfeasor or insurer because of the injury.

History. Acts 1933, No. 130, § 5; Pope's Dig., §§ 7993, 10822; A.S.A. 1947, § 51-805; Acts 1993, No. 271, § 10.

CASE NOTES**ANALYSIS**

Duty of Liennee.
Presumptions.
Proof of Liability.

Duty of Liennee.

The lien cannot be evaded by a settlement; the lienee must take notice of the lien and if he settles the lawsuit without protecting the lienor, he does so at his peril. *Buchanan v. Beirne Lumber Co.*, 197 Ark. 635, 124 S.W.2d 813 (1939).

Presumptions.

A conclusive presumption arises in case of settlement with notice of the lien that the lienee has retained in his hands a sufficient sum to satisfy the lien. *Buchanan v. Beirne Lumber Co.*, 197 Ark. 635, 124 S.W.2d 813 (1939).

Proof of Liability.

If patient fails in his action, the lien provided would also fail, but where settlement is effected, lien claimant does not need to prove liability in order to enforce

lien. *Buchanan v. Beirne Lumber Co.*, 197 Ark. 635, 124 S.W.2d 813 (1939). Representative of *Mitchell*, 755 F. Supp. 255 (W.D. Ark. 1989).

Cited: *Farmers Ins. Co. v. Personal*

18-46-113. Waiver or release of claim by patient.

(a) A patient who has been notified by a practitioner, nurse, hospital, or ambulance service provider of a claim of lien on any claim or right of action that the patient has because of the injury for which service was rendered shall not waive or release that claim, or any part of it, unless:

(1) The amount claimed by the practitioner, nurse, hospital, or ambulance service provider, under the lien, has been paid; or

(2) The practitioner, nurse, hospital, or ambulance service provider has in writing released his or her lien.

(b) Any waiver or release given contrary to the provisions of this chapter shall be void and of no effect.

History. Acts 1933, No. 130, § 8; Pope's Dig., §§ 7996, 10825; A.S.A. 1947, § 51-808; Acts 1993, No. 271, § 11.

18-46-114. Release on satisfaction or waiver of lien required.

(a) When a lien has been satisfied or waived, the practitioner, nurse, hospital, or ambulance service provider that established or waived it shall, on written demand and at the expense of the patient, or the person by whom the patient was injured, or by the insurer obligated by reason of the injury, give a written release, duly acknowledged before a justice of the peace or notary public.

(b)(1) Any practitioner, nurse, hospital, or ambulance service provider that refuses or fails under the circumstances stated, for a period of five (5) days or more after a written demand is made for a release, to execute and deliver the release shall be liable to the demandant for any injury or damage that results from refusal or failure.

(2) In any event he or she shall forfeit to the demandant the sum of twenty-five dollars (\$25.00), which may be recovered in any action for damages because of the failure, or in a civil action before a justice of the peace, as the circumstances of the case require.

History. Acts 1933, No. 130, § 9; Pope's Dig., §§ 7997, 10826; A.S.A. 1947, § 51-809; Acts 1993, No. 271, § 12.

18-46-115. Records of liens and releases.

(a)(1) The clerk of the circuit court in each county shall maintain, at the expense of the county, a file designated and labeled "Medical, Nursing, Hospital, and Ambulance Service Provider Liens", and an appropriate and sufficient book record and index of the liens, properly labeled.

(2) The clerk shall make a record in this book of notices of liens filed in the order in which they are filed, noting therein the names and addresses of patients of practitioners, nurses, hospitals, ambulance service providers, and other persons on whose behalf a notice of lien has been filed, and of tortfeasors and insurers.

(b) On the presentation of a release of any lien, the clerk of the circuit court of the county in which the lien is filed and recorded shall note on the file and in the record the date when the release was filed, and the clerk shall note on the release the fact that it has been so recorded. A release so noted or the record in the office of the clerk of the circuit court shall, either of them, be prima facie evidence of the release of the lien.

(c) The clerk of the circuit court shall be entitled to collect not more than fifty cents (50¢) for the filing, recording, and indexing of each lien, and not more than fifty cents (50¢) for the filing of the release of any lien and noting on the record and on the release the fact that the release has been so filed.

History. Acts 1933, No. 130, § 14; Pope's Dig., §§ 8002, 10831; A.S.A. 1947, § 51-814; Acts 1993, No. 271, § 13.

Publisher's Notes. Section 21-6-101 provides, in part, that the fees prescribed in §§ 16-65-117, 18-44-117, 21-6-306, 21-

6-402, and 21-6-403 shall be in lieu of the fee prescribed in this section for the filing of medical, nursing, and hospital liens. However, none of those sections contains a specific fee for filing medical, nursing, or hospital liens.

18-46-116. Receipt and payment of money by court.

(a) Any court having jurisdiction in an action by a patient injured through the fault or neglect of another person against the person whose fault or neglect caused the injury or against an insurer obligated by reason of that injury, and if an action has not been begun, then any court having authority to entertain an action under the circumstances stated in this subsection, if and when an action is brought, on petition or other procedure conformable to the rules of practice of the court, by the tortfeasor or by the insurer who has been notified of a claim of lien under the provisions of this chapter, may receive and impound:

(1) The amount claimed by any practitioner, nurse, hospital, or ambulance service provider under the lien; or

(2) If no amount is named in the notice of the claim of lien that has been served, then the entire amount claimed by the patient from the tortfeasor or from the insurer or any less amount that the court deems sufficient to pay the amount claimed under the claims of lien or liens as have been served.

(b) The court may pay or distribute the money in accordance with that petition, motion, or judgment and pay any remaining balance to the person by whom the money was deposited:

(1) On joint motion or petition of the patient and the practitioner or practitioners, nurse or nurses, hospital or hospitals, and ambulance service provider or providers claiming interest in the money so paid into court; or

(2) On judgment by any competent court.

History. Acts 1933, No. 130, § 6; Pope's Dig., §§ 7994, 10823; A.S.A. 1947, § 51-806; Acts 1993, No. 271, § 14.

18-46-117. Pro rata payment of claims.

If the amount for which a tortfeasor or an insurer is liable to the patient on account of his or her injury is not sufficient to pay in full the claims of all practitioners, nurses, hospitals, and ambulance service providers that rendered service in the case and who have given notice of liens, then each practitioner, nurse, hospital, and ambulance service provider shall share in the amount payable to the patient in the proportion that his or her claim bears to the total amount claimed by all other practitioners, nurses, hospitals, and ambulance service providers.

History. Acts 1933, No. 130, § 5; Pope's Dig., §§ 7993, 10822; A.S.A. 1947, § 51-805; Acts 1993, No. 271, § 15.

CASE NOTES

Full Amount of Lien Not Discharged.

Where hospital's assignee established lien pursuant to § 18-46-108 and received a pro rata share of settlement proceeds pursuant to this section, acceptance of amount less than full amount of the lien did not discharge the entire debt as court order apportioning settlement and extinguishing the lien did not raise or determine issue of debtor's liability on the

entire debt, was not the equivalent of extinguishing the debt and did not bar assignee, under the doctrine of res judicata, from seeking payment of the greater amount, and there was no agreement between the parties that acceptance of a lesser amount would operate as an accord and satisfaction of the debt. *Fort Smith Serv. Fin. Corp. v. Parrish*, 302 Ark. 299, 789 S.W.2d 723 (1990).

CHAPTER 47
FEDERAL LIENS

SUBCHAPTER.

1. GENERAL PROVISIONS. [RESERVED.]
2. UNIFORM FEDERAL LIEN REGISTRATION ACT.

SUBCHAPTER 1 — GENERAL PROVISIONS

[Reserved]

SUBCHAPTER 2 — UNIFORM FEDERAL LIEN REGISTRATION ACT

SECTION.

- 18-47-201. Scope.
- 18-47-202. Place of filing.
- 18-47-203. Execution of notices and certificates.
- 18-47-204. Duties of filing officer.

SECTION.

- 18-47-205. Fees.
- 18-47-206. Uniformity of application and construction.
- 18-47-207. Short title.
- 18-47-208. [Repealed.]

Publisher's Notes. For Comments regarding the Uniform Federal Lien Registration Act, see Commentaries Volume B.

Former subchapter 2, concerning the uniform federal tax lien registration act, was repealed by Acts 1989, No. 835, § 8. The former subchapter was derived from the following sources:

18-47-201. Acts 1941, No. 316, § 1; A.S.A. 1947, § 51-101.

18-47-202. Acts 1941, No. 316, § 2; A.S.A. 1947, § 51-102.

18-47-203. Acts 1941, No. 316, § 3; A.S.A. 1947, § 51-103.

18-47-204. Acts 1941, No. 316, § 4; A.S.A. 1947, § 51-104.

18-47-205. Acts 1941, No. 316, § 5; A.S.A. 1947, § 51-105.

18-47-206. Acts 1941, No. 316, § 6; A.S.A. 1947, § 51-106.

18-47-207. Acts 1941, No. 316, § 7; A.S.A. 1947, § 51-107.

18-47-208. Acts 1941, No. 316, § 8; A.S.A. 1947, § 51-107n.

Effective Dates. Acts 1989, No. 835, § 10: Mar. 22, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that the existing law regarding the filing of federal liens is inadequate and out of date and there is a need to make the law of all of the states uniform. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall be in effect from the date of its passage and approval."

CASE NOTES

Motor Vehicles.

It was not the intention of the legislature in enacting § 27-14-101 et seq. to repeal this subchapter as it related to automobiles or otherwise. *Union Planters Nat'l Bank v. Godwin*, 140 F. Supp. 528 (E.D. Ark. 1956).

Where government complied with this

subchapter in filing tax lien on automobile, the lien would be preferred to claim of purchaser at execution sale under judgment obtained after time of filing of lien even though the provisions of §§ 27-14-801 — 27-14-804 were not complied with. *Union Planters Nat'l Bank v. Godwin*, 140 F. Supp. 528 (E.D. Ark. 1956).

18-47-201. Scope.

This subchapter applies only to federal tax liens and to other federal liens notices of which under any Act of Congress or any regulation adopted pursuant thereto are required or permitted to be filed in the same manner as notices of federal tax liens.

History. Acts 1989, No. 835, § 1.

RESEARCH REFERENCES

Ark. L. Rev. Carroll, Uniform Laws in Arkansas, 52 Ark. L. Rev. 313.

18-47-202. Place of filing.

(a) Notices of liens, certificates, and other notices affecting federal tax liens or other federal liens must be filed in accordance with this subchapter.

(b) Notices of liens upon real property for obligations payable to the United States and certificates and notices affecting the liens shall be

filed in the office of the circuit clerk of the county in which the real property subject to the liens is situated.

(c) Notices of federal liens upon personal property, whether tangible or intangible, for obligations payable to the United States and certificates and notices affecting the liens shall be filed as follows:

(1) If the person against whose interest the lien applies is a corporation or a partnership whose principal executive office is in this state, as these entities are defined in the internal revenue laws of the United States, in the office of the Secretary of State;

(2) If the person against whose interest the lien applies is a trust that is not covered by paragraph (1), in the office of the Secretary of State;

(3) If the person against whose interest the lien applies is the estate of a decedent, in the office of the Secretary of State;

(4) In all other cases, in the office of the circuit clerk of the county where the person against whose interest the lien applies resides at the time of filing of the notice of lien.

History. Acts 1989, No. 835, § 2.

CASE NOTES

Bankruptcy.

Bankruptcy court denied Chapter 13 debtors' objection to a secured claim the Internal Revenue Service ("IRS") filed against their bankruptcy estate that was based on the debtors' argument that the IRS did not have a secured claim against personal property they owned because it filed a lien under 26 U.S.C.S. § 6323 in Mississippi County, Arkansas, and the debtors had moved the property to Cleburne County, Arkansas. Section

6323(f)(2)(B) eliminated the need for the IRS to file tax liens in every location to which a taxpayer might move by creating a fiction and deeming the property situated at the location where the property was located when the lien was filed, and the IRS complied with subdivision (c)(4) of this section when it filed its lien in Mississippi County because the male debtor lived in Mississippi County at the time the lien was filed. In re Chitmon, 475 B.R. 689 (Bankr. E.D. Ark. 2012).

18-47-203. Execution of notices and certificates.

Certification of notices of liens, certificates, or other notices affecting federal liens by the Secretary of the Treasury of the United States or his delegate, or by any official or entity of the United States responsible for filing or certifying of notice of any other lien, entitles them to be filed and no other attestation, certification, or acknowledgement is necessary.

History. Acts 1989, No. 835, § 3.

18-47-204. Duties of filing officer.

(a) If a notice of federal lien, a refiling of a notice of federal lien, or a notice of revocation of any certificate described in subsection (b) is presented to a filing officer who is:

(1) The Secretary of State, he or she shall cause the notice to be marked, held, and indexed in accordance with the provisions of § 4-9-501 et seq. of the Uniform Commercial Code as if the notice were a financing statement within the meaning of that code; or

(2) Any other officer described in § 18-47-202, he or she shall endorse thereon his identification and the date and time of receipt and forthwith file it alphabetically or enter it in an alphabetical index showing the name and address of the person named in the notice, the date and time of receipt, the title and address of the official or entity certifying the lien, and the total amount appearing on the notice of lien.

(b) If a certificate of release, nonattachment, discharge, or subordination of any lien is presented to the Secretary of State for filing, he or she shall:

(1) Cause a certificate of release or nonattachment to be marked, held, and indexed as if the certificate were a termination statement within the meaning of the Uniform Commercial Code, but the notice of lien to which the certificate relates may not be removed from the files; and

(2) Cause a certificate of discharge or subordination to be marked, held, and indexed as if the certificate were a release of collateral within the meaning of the Uniform Commercial Code.

(c) If a refiled notice of federal lien referred to in subsection (a) or any of the certificates or notices referred to in subsection (b) is presented for filing to any other filing officer specified in § 18-47-202, he or she shall permanently attach the refiled notice or the certificate to the original notice of lien and enter the refiled notice or the certificate with the date of filing in any alphabetical lien index on the line where the original notice of lien is entered.

(d) Upon request of any person, the filing officer shall issue his or her certificate showing whether there is on file, on the date and hour stated therein, any notice of lien or certificate or notice affecting any lien filed under this subchapter, or Act 314 of 1941 as amended [repealed], naming a particular person, and if a notice or certificate is on file, giving the date and hour of filing of each notice or certificate. The fee for a certificate is three dollars (\$3.00). Upon request, the filing officer shall furnish a copy of any notice of federal lien, or notice or certificate affecting a federal lien, for a fee of fifty cents (50¢) per page.

History. Acts 1989, No. 835, § 4.

18-47-205. Fees.

The fee for filing and indexing each notice of lien or certificate or notice affecting the lien is:

(1) For a lien on real estate, six dollars (\$6.00) for the first page and one dollar (\$1.00) for each additional page;

(2) For a lien on tangible and intangible personal property, six dollars (\$6.00);

(3) For a certificate of discharge or subordination, six dollars (\$6.00) for the first page and one dollar (\$1.00) for each additional page;

(4) For all other notices, including a certificate of release or nonattachment, six dollars (\$6.00) for the first page and one dollar (\$1.00) for each additional page.

The officer shall bill the district directors of the federal Internal Revenue Service or other appropriate federal officials on a monthly basis for fees for documents filed by them.

History. Acts 1989, No. 835, § 5; 1995, No. 769, § 1.

18-47-206. Uniformity of application and construction.

This subchapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this subchapter among states enacting it.

History. Acts 1989, No. 835, § 6.

18-47-207. Short title.

This subchapter may be cited as the "Uniform Federal Lien Registration Act".

History. Acts 1989, No. 835, § 7.

18-47-208. [Repealed.]

Publisher's Notes. This section, concerning the repeal of inconsistent acts, was repealed by Acts 1989, No. 835, § 8.

The section was derived from Acts 1941, No. 316, § 8; A.S.A. 1947, § 51-107n.

CHAPTER 48

MISCELLANEOUS LIENS ON PERSONAL PROPERTY

SUBCHAPTER.

1. ANIMALS GENERALLY.
2. ANIMALS — FEEDING AND CARE OF LIVESTOCK.
3. ANIMALS — SERVICES OF MALE ANIMAL.
4. MOTOR VEHICLE STORAGE.
5. PROCESSED FARM PRODUCTS.
6. CEMETERY MONUMENTS.
7. MARINA FACILITY OPERATORS.
8. PRINCIPAL BROKER REAL ESTATE LIEN ACT.

RESEARCH REFERENCES

Ark. L. Rev. Creditors' Provisional Rights: Statutory Liens in Arkansas, 32 Remedies and Debtors' Due Process Ark. L. Rev. 185.

U. Ark. Little Rock L.J. Maltz, State Action and Statutory Liens in Arkansas — A Reply to Professor Nickles, 2 U. Ark. Little Rock L.J. 357.

Nickles, State Action and Statutory Liens in Arkansas — A Rejoinder to Professor Maltz, 2 U. Ark. Little Rock L.J. 369.

SUBCHAPTER 1 — ANIMALS GENERALLY

SECTION.

- 18-48-101. Lien of livery stable keepers.
- 18-48-102. Sale of property on behalf of livery stable keeper.

Effective Dates. Acts 1873, No. 134, § 4: effective on passage.

18-48-101. Lien of livery stable keepers.

(a) All keepers of livery, sale, or feed stables, or wagonyards shall have a lien on all horses, mules, or other stock or property left in their charge to be kept, fed, sold, or otherwise cared for and sheltered for all their reasonable costs and charges for feeding, keeping, and otherwise taking care of them.

(b) For this lien, stable or wagonyard keepers are authorized to keep possession of any of the property mentioned in subsection (a) of this section until such reasonable charges are paid or tendered to them or their agents by the owner of the property or his or her agents.

(c) In case any such property shall be left with a stable or wagonyard keeper, and not be called for by the owner thereof, and the charges and costs paid thereon to the keeper before the charges and costs shall amount to the value thereof, and the cost of selling the property as provided in § 18-48-102, it shall be lawful for the stable or wagonyard keeper to sell the property in the manner prescribed in § 18-48-102.

History. Acts 1873, No. 134, § 1, p. Dig., §§ 8860-8862; A.S.A. 1947, § 51-428; C. & M. Dig., §§ 6901-6903; Pope's 903.

CASE NOTES

Cited: Cherry v. Dillard, 131 Ark. 245, 199 S.W. 83 (1917).

18-48-102. Sale of property on behalf of livery stable keeper.

(a)(1) Whenever any person shall leave or deposit with any keeper of a livery, sale, or feed stable or wagonyard any horses, mules, or other stock or property and shall neglect or refuse to call for them and pay the

reasonable charges and costs thereon to the keeper of the stable or yard before the charges and costs shall amount to the value of the property at public sale, the stable or wagonyard keeper may have the property sold at public sale.

(2)(A) The keeper must first give the owner thirty (30) days' actual or constructive notice of the sale, specifying the day, the hour thereof, and place of the sale.

(B) Notice shall be published in any newspaper published in the county in which the stable or yard may be situated in which legal notices are authorized to be published.

(b) Out of the proceeds of the sale there shall be paid:

(1) The costs and expenses of the sale;

(2) The amount due the stable or yard keeper for keeping and feeding the stock; and

(3) The balance, if any, to be held by the keeper for the use and subject to the order of the owner of the property so sold.

(c) All sales of property under this subchapter shall be made by a public and licensed auctioneer if there is one in the town or city where the sale is made and, if none, then by a constable of the township in which the stable or yard is situated.

History. Acts 1873, No. 134, § 2, p. 428; C. & M. Dig., §§ 6904, 6905; Pope's Dig., §§ 8863, 8864; A.S.A. 1947, § 51-904.

SUBCHAPTER 2 — ANIMALS — FEEDING AND CARE OF LIVESTOCK

SECTION.

18-48-201. Definitions.

18-48-202. Stolen livestock exempted.

18-48-203. Filing of written contracts for tending of livestock.

18-48-204. Recording, etc., of liens by third parties.

18-48-205. Priority of liens.

18-48-206. Lien of livestock tender — Amount.

18-48-207. Possession of livestock by tender.

SECTION.

18-48-208. Delivery of animals as waiver of lien — Exception.

18-48-209. Time for enforcement of lien.

18-48-210. Methods of enforcement.

18-48-211. Notice required prior to public sale — Affidavit — Waiver of notices.

18-48-212. Sale and disposition of proceeds.

Effective Dates. Acts 1957, No. 311, § 16: approved Mar. 27, 1957. Emergency clause provided: "Because this Act is necessary for the protection of the property rights of residents of Arkansas who are expending considerable sums of money and of property in feeding cattle belonging both to residents and nonresidents, and because the feeding of such cattle is of

great benefit to the National economy of the United States, as well as to the economy of Arkansas and adjacent states, it is found that the public peace, health and safety requires the immediate passage and effectiveness of this Act; therefore, an emergency is declared and all of the provisions of this Act shall become effective from and after its passage."

18-48-201. Definitions.

As used in this subchapter:

(1)(A) "Circuit clerk" means the office in the county where records of deeds and mortgages are kept.

(B) In counties with more than one (1) county seat, it means the office where records of deeds are filed relating to the larger portion of the land where the livestock is kept;

(2) "Lienholder" means any person who holds a lien upon livestock by virtue of a valid conditional sale contract, chattel mortgage, or other encumbrance;

(3) "Livestock" means any horses, mules, cattle, sheep, or hogs, and their increase, but shall not be limited solely to those animals specifically named;

(4) "Owner" means any person who has title to livestock, either legal or equitable;

(5) "Person" means any individual, firm, or corporation, including copartnerships, trusts, associations, and similar legal entities, and duly authorized agents of the person; and

(6)(A) "Written contracts" means any original impression or copies duly signed by the owners and the person tending or agreeing to tend the livestock.

(B) No acknowledgment is required in order for written contracts or for written notice or written protest to be subject to being filed in the clerk's office under the provisions of this subchapter.

History. Acts 1957, No. 311, § 13;
A.S.A. 1947, § 51-929.

18-48-202. Stolen livestock exempted.

The lien provided under this subchapter shall not apply to any stolen livestock.

History. Acts 1957, No. 311, § 10;
A.S.A. 1947, § 51-926.

18-48-203. Filing of written contracts for tending of livestock.

(a)(1) All written contracts or copies of them, duly certified by a notary public as true and correct, shall be filed in the office of the circuit clerk of the county where the owners, or either of them, reside, if they reside in Arkansas, and also in the office of the circuit clerk of the county where the livestock is being fed, herded, pastured, kept, or ranched.

(2) If none of the owners reside in Arkansas, the written contract of owners, or copy of it as previously described, shall be filed in the office of the circuit clerk or, if there is no circuit clerk, in the office of the registrar of deeds in the county where the owners, or either of them, reside.

(b) The fee to the clerk for filing shall be fifty cents (50¢).

(c) The clerk shall list the liens in a separate book kept for "Agistor Liens". It is not necessary for the clerk to record these contracts, but the clerk will retain them in his or her office.

(d) The lien shall be effective only when these provisions have been complied with and from the date when the last contract is filed.

History. Acts 1957, No. 311, § 2; A.S.A. 1947, § 51-918.

18-48-204. Recording, etc., of liens by third parties.

(a) Holders of conditional sale contracts shall not be required to record their contracts.

(b) Holders of chattel mortgages and other claimants of liens upon livestock must comply with laws relating to recording, filing, and otherwise required as notice to bona fide third parties before they are entitled to receive the notices mentioned in § 18-48-211 relating to lienholders.

History. Acts 1957, No. 311, § 12; A.S.A. 1947, § 51-928.

18-48-205. Priority of liens.

(a)(1) The lien provided in this subchapter shall be first and prior to that of any conditional sale contract, recorded or filed chattel mortgage, or other encumbrance that is executed after March 27, 1957, if the person feeding, herding, pasturing, keeping, or ranching the livestock complies with the provisions of § 18-48-203 and if the person also notifies the holder of the conditional sale contract, recorded or filed chattel mortgage, or other encumbrance about the existence of the written contract by the sheriff serving a written notice upon the lienholder, or by mailing a written notice to the lienholder by registered or certified mail, return receipt requested, that this person has entered into a written contract with the owners of the livestock to feed, herd, pasture, keep, or ranch them.

(2) This written notice shall advise the lienholder briefly of the substance of the written contract and that a lien is claimed under this subchapter.

(b)(1) The conditional sale vendor, mortgagee, or other lienholder of the livestock, if his or her lien is prior in time to that of the lien claimed under this section, may retain priority, either by having the sheriff serve a written protest upon the person claiming the lien under this subchapter, by mailing to the person a written protest by registered or certified mail, return receipt requested, or by filing the written protest in the office of the circuit clerk of the county where it is proposed that the livestock will be fed, herded, pastured, kept, or ranched.

(2) This written protest must be delivered to the person, mailed to the person, or filed in the clerk's office within a period of fifteen (15) days from the date that the lienholder received notice of the existence

of the contract. Otherwise, the lien provided for in this subchapter shall have full and complete priority over the lien claimed by the holder of the conditional sale contract, recorded or filed chattel mortgage, or other encumbrance.

(c) The circuit clerk shall be entitled to fifty cents (50¢) for filing this written protest, and it shall be a legal debt of the person claiming the lien under this section even though the fifty cents (50¢) is paid in the first instance by the conditional sale vendor, mortgagee, or other holder of encumbrance.

(d) The holder of the conditional sale contract, chattel mortgage, or other encumbrance will not be bound by any extensions of time as provided for in the original contract, or for any other modifications of the contract, unless the lienholder consents in writing to it.

History. Acts 1957, No. 311, § 11;
A.S.A. 1947, § 51-927.

18-48-206. Lien of livestock tender — Amount.

(a) Any person to whom horses, mules, cattle, sheep, hogs, or other livestock shall be entrusted by their owners or their agent for the purpose of feeding, herding, pasturing, keeping, or ranching shall have a lien upon the horses, mules, cattle, sheep, hogs, or other livestock for the amount that may be due for feeding, herding, pasturing, keeping, or ranching, and for all costs incurred in enforcing the lien, including a reasonable sum for attorney's fees.

(b) The amount that may be due shall either be the specific sum or the share of the livestock set by written contract or, if no specific sum or share is agreed upon, a reasonable sum for the services.

History. Acts 1957, No. 311, § 1; A.S.A.
1947, § 51-917.

18-48-207. Possession of livestock by tender.

When the lien becomes effective, the person tending livestock shall be entitled to retain possession of the livestock until payment in full has been made for the feeding, herding, pasturing, keeping, or ranching.

History. Acts 1957, No. 311, § 3; A.S.A.
1947, § 51-919.

18-48-208. Delivery of animals as waiver of lien — Exception.

(a) The voluntary delivery to the owners or lienholders of all livestock tended by a person tending them under this subchapter shall be held to waive or abandon the lien.

(b) However, the holder of the lien under this subchapter may allow the owners of the livestock, or lienholders, to transport them to market for sale in the joint names of the holder of the lien and of the owners of

the livestock, or of the lienholders, and in that event the lien provided in this subchapter shall not be waived or abandoned.

History. Acts 1957, No. 311, § 9; A.S.A. 1947, § 51-925.

18-48-209. Time for enforcement of lien.

If the owners fail to pay the fixed charges provided for in the written contract, or otherwise breach their agreement, the person who has custody of the livestock may proceed to enforce his or her lien under this subchapter at any time after ten (10) days from the date when the payment became delinquent or when the contract was breached, but at no time later than one (1) year from the date of delinquency or of breach of contract.

History. Acts 1957, No. 311, § 4; A.S.A. 1947, § 51-920.

18-48-210. Methods of enforcement.

The lien may be enforced either by public sale as provided in §§ 18-48-211 and 18-48-212 or by suit filed in the circuit court of the county wherein the livestock on which the lien is attached is located, without regard as to the amount in controversy.

History. Acts 1957, No. 311, § 5; A.S.A. 1947, § 51-921.

18-48-211. Notice required prior to public sale — Affidavit — Waiver of notices.

(a) Before any livestock shall be sold at public sale, without court action, if the names and addresses of the owners and if the name and address of the conditional sales vendor, mortgagor, or other prior lienholder are known, at least twenty (20) days' notice of the sale shall be given them in writing, either by the sheriff serving the notice upon the owner and the lienholder or by registered or certified mail, return receipt requested.

(b) In addition, a notice of the time and place of sale, containing a general description of the livestock, shall be published at least one (1) time a week for a period of two (2) weeks consecutively, in a newspaper of general circulation, if there is one published in the county where the livestock is kept and where the sale shall take place. If no newspaper is published in that county, five (5) handbills containing the same information shall be posted in at least five (5) public places in the township, the town, or the city where the sale shall take place.

(c) It shall be the duty of the person claiming the lien under this subchapter to cause the notices to be served, mailed, and published.

(d) Copies of the notice required by this section and proof of the publication or the posting of it, and an affidavit of the person causing

the livestock to be sold to enforce his or her lien shall be filed and kept in the circuit clerk's office of the county where the sale takes place. Copies of it shall be received in evidence in all courts, if certified by the clerk.

(e) Owners or lienholders may waive any and all notices required under this section, if the waivers are in writing. These written waivers shall be effective only from the time they are filed in the clerk's office.

History. Acts 1957, No. 311, §§ 6, 8, 12;
A.S.A. 1947, §§ 51-922, 51-924, 51-928.

18-48-212. Sale and disposition of proceeds.

(a) All sales under this subchapter shall be at public auction for cash.

(b)(1) The proceeds of the sale, after payment of the charges for the feeding, herding, pasturing, keeping, or ranching of the livestock, from the date when the lien became effective under § 18-48-203 until the date of the sale, and all the expenses of the sale, including costs of publication, attorney's fees, and costs of public auctioneer, if any, shall, if the owners are absent or unknown, be deposited with the treasurer of the county where the sale takes place by the person making the sale.

(2) These net proceeds shall be paid to the persons entitled to them when they properly establish ownership in, or lien upon, the livestock, either by claim of title or by claim of valid lien.

History. Acts 1957, No. 311, §§ 6, 7;
A.S.A. 1947, §§ 51-922, 51-923.

SUBCHAPTER 3 — ANIMALS — SERVICES OF MALE ANIMAL

SECTION.

18-48-301. Nature of lien.

18-48-302. Penalty for sale, exchange, removal, or disposition of female animal.

SECTION.

18-48-303. Filing of claim — Summons.

18-48-304. Bond for retention of animals.

18-48-305. Judgment.

18-48-301. Nature of lien.

(a) The owner of any male animal, kept for the propagation of his species, shall have a lien upon any female animal and her offspring to which the male is let for the sum contracted therefor.

(b) The lien shall attach at the time of service of the male and shall not be lost by reason of any sale, exchange, or removal from the county, or other disposition, without consent of the person holding the lien, in which case it may be immediately enforced.

History. Acts 1909, No. 252, § 1, p. 756; C. & M. Dig., § 6937; Pope's Dig., § 8899; A.S.A. 1947, § 51-905.

CASE NOTES

Fee on Contingency.

Under a contract that the fee would become due whenever the mare became in foal or was traded, the fee became due when the mare was sold during the period

of gestation, though at the time of sale she was not with foal. *Pitchcock v. Donnahoo*, 70 Ark. 68, 66 S.W. 145 (1902) (decision under prior law).

18-48-302. Penalty for sale, exchange, removal, or disposition of female animal.

Upon the sale, exchange, removal, or disposition of a female animal described in § 18-48-301 without consent of the person holding the lien or with intent to defraud him or her, the owner of the female animal shall be guilty of a violation and upon conviction shall be fined in any sum not less than twenty-five dollars (\$25.00) nor more than fifty dollars (\$50.00).

History. Acts 1909, No. 252, § 1, p. § 8899; A.S.A. 1947, § 51-905; Acts 2005, 756; C. & M. Dig., § 6937; Pope's Dig., No. 1994, § 99.

18-48-303. Filing of claim — Summons.

(a)(1) At any time within twenty (20) months after the right of action accrues, the owner of the male animal may file a written statement with any justice of the peace in the county.

(2) This statement shall be duly verified and shall set forth the amount of the claim, the cause of action, and a description of the animal upon which there is a lien.

(b) The justice shall thereupon issue summons as in other cases and embody in the summons a description of the animal and an order to the constable to take the animal and her offspring, if there is offspring, and hold it or them subject to the order of the court.

History. Acts 1909, No. 252, § 2, p. 756; C. & M. Dig., § 6938; Pope's Dig., § 8900; A.S.A. 1947, § 51-906.

18-48-304. Bond for retention of animals.

The owner may give bond for the retention of the animal or animals as in actions for the recovery of personal property.

History. Acts 1909, No. 252, § 3, p. 756; C. & M. Dig., § 6939; Pope's Dig., § 8901; A.S.A. 1947, § 51-907.

18-48-305. Judgment.

(a) If, upon trial, judgment is rendered for the plaintiff, the court shall order a sale of the animal or animals as on execution sales to pay the judgment and costs.

(b) If bond is given for the retention of the animal or animals, the court shall render judgment on the bond against the sureties for the amount of the plaintiff's debt and cost.

History. Acts 1909, No. 252, § 4, p. 756; C. & M. Dig., § 6940; Pope's Dig., § 8902; A.S.A. 1947, § 51-908.

SUBCHAPTER 4 — MOTOR VEHICLE STORAGE

SECTION.

18-48-401. Construction.

18-48-402. Right to lien.

SECTION.

18-48-403. Priority of lien.

18-48-404. Sale for storage charges.

18-48-401. Construction.

This subchapter shall not be construed to amend or repeal any existing laws, unless in direct conflict therewith.

History. Acts 1951, No. 251, § 4; A.S.A. 1947, § 51-916.

18-48-402. Right to lien.

Any person, firm, or corporation engaged in the business of the storage of automobiles and other motor vehicles, whether the storage is the principal line of business or an incident to the regular business, shall have a lien upon the motor vehicle so stored for the sums of money due for the storage.

History. Acts 1951, No. 251, § 1; A.S.A. 1947, § 51-913.

CASE NOTES

Possession.

In an owner's action seeking recovery of an all-terrain vehicle (ATV), a monetary award in favor of a wrecker service was erroneous because the wrecker service's liens under § 18-45-201 and this section

were satisfied upon receipt of the sum generated from the sale of the ATV and its lack of perfection of its lien under § 27-50-1208 precluded a finding of a possessory lien. *Payne v. Donaldson*, 2010 Ark. App. 255, 379 S.W.3d 22 (2010).

18-48-403. Priority of lien.

The lien provided for in this subchapter shall have the same priority as is provided by § 18-45-202.

History. Acts 1951, No. 251, § 4; A.S.A. 1947, § 51-916.

18-48-404. Sale for storage charges.

(a) Any person, firm, or corporation having a lien under the provisions of this subchapter and retaining possession of the motor vehicle by virtue of the lien thereon for storage charges shall have the right to sell it for the satisfaction of the debt for which the motor vehicle was held.

(b) The sale may be made in the manner now provided for sale of other personal property under the provisions of §§ 18-45-204 and 18-45-205.

History. Acts 1951, No. 251, §§ 2, 3;
A.S.A. 1947, §§ 51-914, 51-915.

SUBCHAPTER 5 — PROCESSED FARM PRODUCTS

SECTION.

- 18-48-501. Definitions.
- 18-48-502. Applicability.
- 18-48-503. Right to lien generally.
- 18-48-504. Enforcement of lien in general.

SECTION.

- 18-48-505. Cotton ginner's lien.
- 18-48-506. Enforcement of cotton ginner's lien.

Cross References. Laborers' liens,
§ 18-43-101 et seq.

Effective Dates. Acts 1907, No. 231,
§ 3: effective on passage.

Acts 1949, No. 81, § 6: approved Feb.
14, 1949. Emergency clause provided:

"This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared to exist, and this Act shall take effect and be in force from and after its passage."

RESEARCH REFERENCES

Ark. L. Rev. Looney, Legal and Economic Considerations in Drafting Arkansas Farm Leases, 35 Ark. L. Rev. 395.

18-48-501. Definitions.

As used in this section and §§ 18-48-502 — 18-48-504 "owner" and "operator" mean corporations, partnerships, or individuals engaged in the business of elevators, drying, cleaning, milling, or processing rice or other similar farm products.

History. Acts 1949, No. 81, § 4; A.S.A.
1947, § 51-912.

18-48-502. Applicability.

This section and §§ 18-48-501, 18-48-503, and 18-48-504 shall specifically further protect all owners and operators of dryers, elevators, or cleaning, milling, or processing plants, but do not extend to any relationship between the owner or operator and his or her employee or employees.

History. Acts 1949, No. 81, § 3; A.S.A. 1947, § 51-911.

18-48-503. Right to lien generally.

The owner of any plant in this state engaged in the drying, cleaning, milling, or processing of rice or any other similar farm products for another shall have an absolute lien on the farm product to secure the payment for the drying, cleaning, milling, or processing of the farm product and for its storage or handling. This lien shall be superior to all other prior liens.

History. Acts 1949, No. 81, § 1; A.S.A. 1947, § 51-909.

18-48-504. Enforcement of lien in general.

(a)(1) Any owner of any plant holding a lien under this section and §§ 18-48-501 — 18-48-503 may hold the farm product, and the by-products thereof, if any, for a period of thirty (30) days, unless his or her claim is sooner paid.

(2) After that time the lienholder may sell such portion of products or by-products, or both, as may be necessary to discharge the lien at the prevailing market price on the market, at private sale, and from the proceeds deduct the amount justly due him or her. This amount shall include reasonable costs for holding the sale and delivering over to the owner of the farm product the balance of the product, if any, remaining.

(3) If the farm product or by-products are gone from the lienholder's possession, he or she may enforce his or her lien before the court, in the manner provided for by law for enforcement of laborers' liens upon the product of their labor.

(b) A lien created by this section and §§ 18-48-501 — 18-48-503 shall be enforced within eight (8) months after the farm product or by-products are dried, cleaned, milled, or processed.

History. Acts 1949, No. 81, § 2; A.S.A. 1947, § 51-910.

18-48-505. Cotton ginner's lien.

(a) The owner of a cotton gin who shall gin seed cotton for another and bale it shall have an absolute lien on the cottonseed and on the

baled cotton to secure the payment of the ginning and the bagging and ties used in baling the cotton.

(b) The lien shall attach to each bale of cotton ginned and baled, and to the seed therefrom, to secure the payment of the ginning and for the bagging and ties used on each and every bale of cotton so ginned and baled for the owner, during the season for which the bale was ginned.

(c) This lien shall be superior to all other prior liens.

History. Acts 1907, No. 231, § 1, p. 536; C. & M. Dig., § 6846; Pope's Dig., § 8802; A.S.A. 1947, § 51-901.

18-48-506. Enforcement of cotton ginner's lien.

(a)(1) A ginner holding a lien under § 18-48-505 and this section may hold the cotton and seed for thirty (30) days, unless his or her claim is paid sooner.

(2) After that time the lienholder may sell it at the best obtainable price on the market, at private sale, and from the proceeds pay his or her just debt and turn the residue over to the owner of the cotton or seed.

(3) If the cotton or seed is gone from the lienholder's possession, he or she may enforce his or her lien before the court, in the manner provided by law for the enforcement of laborers' liens upon the product of their labor.

(b) The lien created by § 18-48-505 and this section shall be enforced within six (6) months after the cotton is ginned, but not thereafter.

History. Acts 1907, No. 231, § 2, p. 536; C. & M. Dig., § 6847; Pope's Dig., § 8803; A.S.A. 1947, § 51-902.

SUBCHAPTER 6 — CEMETERY MONUMENTS

SECTION.

18-48-601. Perfection of lien.

18-48-602. Notice of lien.

18-48-603. Action to enforce lien.

SECTION.

18-48-604. Restrictions on persons in charge of cemeteries.

18-48-601. Perfection of lien.

A person furnishing or placing in a cemetery or burial ground, a monument, gravestone, enclosure, or other structure has a lien thereon for the agreed price thereof, or the part remaining unpaid, with interest from the time the amount was due, upon filing with the superintendent or person in charge of the cemetery or burial ground a notice of lien as provided in this subchapter.

History. Acts 1959, No. 109, § 1; A.S.A. 1947, § 51-930.

18-48-602. Notice of lien.

(a)(1) The notice may be filed at any time after the completion of the work, but must be filed within one (1) year after the agreed price for furnishing or placing the monument, gravestone, enclosure, or other structure becomes due.

(2) The notice shall:

(A) State that the lienor has a lien on the monument, gravestone, enclosure, or structure for the purchase price thereof, or some unpaid part of the purchase price, with interest, specifying the amount agreed to be paid and the amount unpaid;

(B) Provide a description of the monument, gravestone, enclosure, or other structure;

(C) Provide the location of the plot upon which the monument, gravestone, enclosure, or other structure stands; and

(D) Provide the names of the persons with whom the agreement for the purchase and erection of the structure, or for the performance of labor, was made.

(b) The notice shall be signed and verified by the lienor.

(c) The lienor shall, within ten (10) days after the filing of the notice, serve a copy, personally or by mail, upon the person with whom the agreement for the purchase and erection of the monument, gravestone, or any other structure, or for the performance of labor thereon, was made and upon the owner of the lot upon which the monument, gravestone, or other structure is erected, if the name and residence of the owner can, with reasonable diligence, be ascertained.

History. Acts 1959, No. 109, § 2; A.S.A. 1947, § 51-931.

18-48-603. Action to enforce lien.

(a) After the service of the notice, an action to recover the amount of the debt and to enforce a lien therefor may be maintained by the lienor against the person with whom the agreement was made for the purchase and erection of the monument, gravestone, enclosure, or other structure, or for the performance of labor thereon.

(b) If the lienor succeeds in establishing the lien, the judgment recovered may authorize removal of the monument, gravestone, enclosure, or other structure from the burial ground or cemetery to satisfy the amount of the judgment.

History. Acts 1959, No. 109, § 3; A.S.A. 1947, § 51-932.

18-48-604. Restrictions on persons in charge of cemeteries.

(a) The superintendent, or other person in charge of a cemetery or burial ground, shall not permit the removal, alteration, or inscription of a monument, gravestone, enclosure, or other structure against which a

lien exists after the notice of the lien has been filed and served as prescribed in this subchapter, except pursuant to the terms of a judgment recovered in an action brought to enforce the lien.

(b) No officer of a cemetery association, or other person connected with a cemetery or burial ground, shall hinder or obstruct the removal in a proper manner of any monument, gravestone, enclosure, or other structure pursuant to the terms of the judgment.

History. Acts 1959, No. 109, § 3; A.S.A. 1947, § 51-932.

SUBCHAPTER 7 — MARINA FACILITY OPERATORS

SECTION.

18-48-701. Definitions.

18-48-702. Marina operator's lien on watercraft and stored property.

18-48-703. Notice of lien.

18-48-704. Access to leased space — Care of property.

SECTION.

18-48-705. Default — Right to sell property.

18-48-706. Sale procedure.

18-48-707. Disposition of sale proceeds.

18-48-708. Notices — Method of delivery.

18-48-709. Applicability of subchapter.

18-48-701. Definitions.

As used in this subchapter:

(1) "Default" means the failure to perform on time any obligation or duty set forth in the rental agreement;

(2) "Last known address" means that address provided by the occupant in the rental agreement or the address provided by the occupant in a subsequent written notice of a change in address;

(3) "Leased space" means the individual boat slip at the marina facility which is rented to an occupant pursuant to a rental agreement;

(4) "Marina facility" means any property used for renting or leasing individual spaces in which the occupants themselves customarily store and remove their own boats or marina equipment on a self-service basis;

(5) "Marina operator" means the owner, operator, lessor, or sublessor of a marina facility and agent or any other person authorized to manage the facility;

(6) "Net proceeds", as used in § 18-48-706, means the proceeds from the sale authorized after deduction for expenses incurred by the marina operator to exercise its rights under this subchapter, including, but not limited to, attorney's fees, auctioneers' fees, postage, and publication costs, together with the debt owed by the operator and charges directly related to preserving, assembling, advertising, and selling under this subchapter;

(7) "Occupant" means a person or entity entitled to the use of a leased space at a marina facility under a rental agreement between the person and the marina operator;

(8)(A) "Personal property" means movable property not affixed to the land.

(B) "Personal property" includes, but is not limited to, watercraft, equipment, and goods; and

(9) "Rental agreement" means any written agreement between a marina operator and an occupant that establishes or modifies the terms, conditions, or rules concerning the use and occupancy of a marina rental space.

History. Acts 1997, No. 903, § 1.

18-48-702. Marina operator's lien on watercraft and stored property.

(a) The operator of a marina facility has a lien on all personal property stored within each leased space for rent, labor, or other charges and for expenses reasonably incurred in its sale, as provided in this subchapter.

(b) The lien provided for in this section attaches as of the date the lease or rental payment becomes delinquent and shall be superior to any other lien or security interest except the following:

(1) A lien which is perfected and recorded in Arkansas in the name of the occupant, either in the county of the occupant's last known address or in the county where the marina facility is located, prior to the date the lease or rental payment becomes delinquent;

(2) Any tax lien; and

(3) Any lienholder with a perfected security interest in the property.

(c) Nothing in this subchapter shall be construed to prohibit the occupant, operator, lienholder, or any other person or entity claiming an interest in the property stored in the leased space from applying to a court of competent jurisdiction to determine the validity of the lien or its priority.

History. Acts 1997, No. 903, § 2.

18-48-703. Notice of lien.

The rental agreement shall contain a statement, in bold type, advising the occupant:

(1) Of the existence of the lien; and

(2) That property stored in the leased space may be sold to satisfy the lien if the occupant is in default.

History. Acts 1997, No. 903, § 3.

18-48-704. Access to leased space — Care of property.

(a) If an occupant is in default, the marina operator may deny the occupant access to the leased space.

(b)(1) Unless the rental agreement specifically provides otherwise and until a lien sale under this subchapter, the property stored in the leased space remains vested in the occupant.

(2) Entry of the leased space by the marina operator for the purpose of complying with this subchapter shall not constitute conversion nor impose any responsibility for the care, custody, and control of any of the personal property stored.

History. Acts 1997, No. 903, § 4.

18-48-705. Default — Right to sell property.

If the occupant is in default for a period of more than forty-five (45) days, the marina operator may enforce the lien by selling the property stored in the leased space at a public sale for cash.

History. Acts 1997, No. 903, § 5.

18-48-706. Sale procedure.

(a) Before conducting a sale under § 18-48-705, the marina operator shall:

(1)(A) Notify the occupant in writing of the default.

(B) The notice shall be sent by certified mail, return receipt requested, to the occupant at the occupant's last known address, and shall include:

(i) A statement that the contents of the occupant's leased space are subject to the marina operator's lien;

(ii) A statement of the marina operator's claim, indicating the charges due on the date of the notice, the amount of any additional charges which shall become due before the date of sale, and the date those additional charges shall become due;

(iii) A demand for payment of the charges due within a specified time, not less than fourteen (14) days after the date that the notice was mailed;

(iv) A statement that unless that claim is paid within the time stated, the contents of the occupant's space will be sold at a specified time and place;

(v) The name, street address, and telephone number of the marina operator or his or her designated agent whom the occupant may contact to respond to the notice; and

(vi) Designation of the date, time, and place where the contents will be sold unless the default is remedied prior to sale;

(2) Publish one (1) advertisement in a newspaper of general circulation in the county in which the marina facility is located at least seven (7) days prior to sale; and

(3)(A) Contact the circuit clerk in the county where the personal property is stored to determine the name and address of any holder of liens or security interests in the personal property being sold.

(B)(i) The owner shall notify by certified mail, return receipt requested, each holder of a lien or security interest of the time and place of the proposed sale at least ten (10) days prior to conducting the sale.

(ii) The owner shall be required to notify the holder of a lien or security interest only if the lien or security interest is filed under the name of the occupant.

(b) At any time before a sale under this section, the occupant may pay the amount necessary to satisfy the marina operator's lien and redeem the occupant's personal property.

(c) The sale under this subchapter shall be held at the marina facility where the personal property is stored.

(d) A purchaser in good faith of any personal property sold under this subchapter takes the property free and clear of any rights of:

- (1) Persons against whom the lien was valid; and
- (2) Other lienholders.

(e) If the marina operator complies with the provisions of this subchapter, the marina operator's liability:

(1) To the occupant, shall be limited to the net proceeds received from the sale of the personal property; and

(2) To other lienholders, shall be limited to the net proceeds received from the sale of any personal property covered by the other liens or the amount owed to such lienholders, whichever is less.

(f) The marina operator shall retain a copy of all notices and return receipts required by subsection (a) of this section for six (6) months following the date of the lien sale.

History. Acts 1997, No. 903, § 6.

18-48-707. Disposition of sale proceeds.

(a) Proceeds from the sale shall be paid, in order of priority:

- (1) To satisfy all prior liens having priority over the marina operator's lien as set forth in § 18-48-702;
- (2) To satisfy the marina operator's lien; and
- (3) To the occupant or other person or persons entitled thereto.

(b) If a sale is held under this subchapter, the marina operator shall distribute the sale proceeds pursuant to subsection (a) of this section within ten (10) days following the sale.

(c) Any funds remaining in the possession of the marina operator, after the exhaustion of reasonable efforts to locate and distribute the funds to prior lienholders, the occupant or other persons entitled thereto, shall escheat to the county.

History. Acts 1997, No. 903, § 7; 1997, No. 1316, § 1.

18-48-708. Notices — Method of delivery.

(a) Unless otherwise specifically provided, all notices required by this subchapter shall be sent by certified mail, return receipt requested.

(b)(1) Notices sent to the operator shall be sent to the marina facility where the occupant's property is stored.

(2) Notices to the occupant shall be sent to the occupant at the occupant's last known address.

(3) Notices shall be deemed delivered when deposited with the United States Postal Service, properly addressed as provided in § 18-48-706(a) with postage prepaid.

History. Acts 1997, No. 903, § 8.

18-48-709. Applicability of subchapter.

The provisions of this subchapter shall be applicable only in those situations in which the rental agreement is between a marina operator and the occupant.

History. Acts 1997, No. 903, § 9.

SUBCHAPTER 8 — PRINCIPAL BROKER REAL ESTATE LIEN ACT

SECTION.

- 18-48-801. Title.
- 18-48-802. Definitions.
- 18-48-803. Lien upon personal property.
- 18-48-804. Waiver of right to a lien —
Action by principal broker.
- 18-48-805. Notice of claim of lien against
proceeds.

SECTION.

- 18-48-806. Delivery of notice of claim of
lien.
- 18-48-807. Release of notice of claim of
lien.
- 18-48-808. Disputed claim — Order to
show cause.
- 18-48-809. Priority of lien claims.

18-48-801. Title.

This subchapter shall be known and may be cited as the "Principal Broker Real Estate Lien Act".

History. Acts 2005, No. 1944, § 1; substituted "Principal Broker Real Estate Lien Act" for "Real Estate Licensee Lien Act"; 2011, No. 340, § 1.

Amendments. The 2011 amendment

18-48-802. Definitions.

As used in this subchapter:

(1)(A) "Base rent" means the rent designated in a lease as base rent, or a similar term, for the possession and use of commercial real estate.

(B) "Base rent" does not include separate payments made by tenants for insurance, taxes, utilities, or other expenses;

(2)(A) "Commercial real estate" means:

(i) A fee simple, freehold, leasehold, or other title, interest, or possessory estate in real property located in the State of Arkansas; and

(ii) Real property if the property is identified as commercial real estate in the representation agreement.

(B) "Commercial real estate" does not mean an interest in real property that is:

- (i) Improved with one (1) single-family residential unit or one (1) multifamily structure with four (4) or fewer residential units; or
- (ii) Improved with single-family residential units such as condominiums, townhouses, timeshares, or houses in a subdivision that may be sold, leased, or otherwise disposed of on a unit-by-unit basis;
- (3) "Days" means calendar days;
- (4) "Disposition" means a voluntary transfer or conveyance of commercial real estate;
- (5) "Escrow closing agent" means the person or entity that receives documents and funds for recording and disbursement in the completion of a transaction for the disposition of commercial real estate;
- (6) "Lease" means a written agreement affecting commercial real estate that creates a landlord and tenant relationship under which the holder of a fee simple interest or possessory estate in commercial real estate permits another to possess the commercial real estate for the period of time contained in the lease;
- (7) "Licensee" means a licensee as defined in § 17-42-103;
- (8)(A) "Net rental proceeds" means the base rent paid by the tenant under a lease less any amounts currently due under the terms of a lien that has priority over a lien created under this subchapter.
 - (B) Net rental proceeds are personal property to which a lien created by this subchapter attaches;
- (9) "Owner" means a person or entity that is vested in record fee title or a possessory estate in commercial real estate;
- (10)(A) "Owner's net proceeds" means the gross sales proceeds from the disposition of commercial real estate described in a notice of claim of lien against proceeds under this subchapter less:
 - (i) Amounts necessary to pay all encumbrances and liens that have priority over the lien created by this subchapter other than those permitted to remain by the buyer of the commercial real estate; and
 - (ii) Owner's closing costs, such as real estate excise tax, title insurance premiums, real estate tax and assessment prorations, and escrow fees required to be paid by the owner under an agreement with the buyer of the commercial real estate.
- (B) "Owner's net proceeds" includes any gross sales proceeds that are:
 - (i) Held by a third party for purposes of completing an exchange of real estate which is deferred from federal income tax under Section 1031 of the Internal Revenue Code of 1986, as it existed on January 1, 2011, but are not used later for that purpose; and
 - (ii) Personal property to which a lien created by this subchapter attaches;
- (11) "Principal broker" means a principal broker as defined in § 17-42-103;
- (12) "Real property" means one (1) or more parcels or tracts of land, including an appurtenance or improvement; and
- (13) "Representation agreement" means a commercial real estate agreement between a licensee and an owner under which the owner agrees to pay a licensee a fee, commission, or other consideration upon:

- (A) Either the disposition or lease of commercial real estate; or
- (B) Entering into an agreement for the disposition or lease of commercial real estate.

History. Acts 2005, No. 1944, § 1; 2011, No. 340, § 1. inserted present (11) and redesignated the remaining subdivisions accordingly.

Amendments. The 2011 amendment substituted “means a licensee as defined” for “has the same meaning as” in (7); and **U.S. Code.** Section 1031 of the Internal Revenue Code of 1986, referred to in (10)(B)(i), is codified as 26 U.S.C. § 1031.

18-48-803. Lien upon personal property.

(a)(1) A principal broker has a lien in the amount that the owner has agreed to pay the principal broker or real estate firm under a representation agreement upon:

(A) The owner’s net proceeds from the disposition of commercial real estate; and

(B) The net rental proceeds from the lease of commercial real estate.

(2) A lien created under subdivision (a)(1) of this section:

(A) Encumbers only personal property;

(B) Does not encumber real property; and

(C) May:

(i) Be asserted only by the principal broker identified in the representation agreement; and

(ii) Not be assigned voluntarily or by operation of law.

(b)(1) Subject to the requirements of subdivisions (b)(2) and (3) of this section, a lien created under subdivision (a)(1) of this section is:

(A) Effective on the date of the recording of a notice of claim of lien upon proceeds in accordance with subdivision (b)(2) of this section; and

(B) Perfected by recording the notice of claim of lien upon proceeds with the circuit clerk in the county or counties in which the commercial real estate is located.

(2)(A) A lien created as the result of a disposition of commercial real estate is not effective unless it is recorded before the deed conveying the commercial real estate is recorded in the office of the circuit clerk in the county or counties in which the commercial real estate is located.

(B) On or before the date the deed conveying the commercial real estate is recorded, the principal broker shall deliver a copy of the notice of claim of lien against proceeds to the escrow closing agent closing the disposition of commercial real estate in the manner provided in § 18-48-806 if the identity of the escrow closing agent is known by the principal broker.

(3) A lien created as the result of a lease of commercial real estate is:

(A) Not effective unless it is recorded within ninety (90) days after:

(i) The tenant takes possession of the leased commercial real estate; or

(ii) For a renewal of a lease of commercial real estate, the commencement date of the renewal lease term; and

(B) Null and void unless the principal broker delivers a copy of the notice of claim of lien against proceeds to the owner of the commercial real estate in the manner provided in § 18-48-806 within ten (10) days of recording the principal broker's notice of claim of lien against proceeds.

History. Acts 2005, No. 1944, § 1; 2011, No. 340, § 1.

Amendments. The 2011 amendment substituted "principal broker" for "licensee" throughout the section; substituted "principal broker or real estate firm" for "licensee" in (a)(1); subdivided (a)(2); substituted "Encumbers only" for "Upon" in (a)(2)(A); substituted "Does not encum-

ber" for "not upon" in (a)(2)(B); substituted "Be asserted only by the principal broker" for "Available only to the licensee" in (a)(2)(C)(i); substituted "§ 18-48-806" for "§ 18-48-807" in (b)(2)(B) and (b)(3)(B); deleted "actually" following "agent is" in (b)(2)(B); subdivided (b)(3)(A); substituted "within ninety (90) days after" for "before" in (b)(3)(A); and inserted (b)(3)(A)(ii).

18-48-804. Waiver of right to a lien — Action by principal broker.

(a) A principal broker may waive his or her right to a lien under this subchapter in the representation agreement.

(b) If a court finds that payment is due to the principal broker in an action to recover amounts due under a representation agreement in which the principal broker has waived his or her right to a lien, the court shall award actual damages, a reasonable attorney's fee, and expenses.

History. Acts 2005, No. 1944, § 1; 2011, No. 340, § 1.

substituted "principal broker" for "licensee" in (a) and twice in (b).

Amendments. The 2011 amendment

18-48-805. Notice of claim of lien against proceeds.

(a) A notice of claim of lien against proceeds shall state:

(1) The name, address, and telephone number of the principal broker;

(2) The date of the representation agreement;

(3) The name of the owner of the commercial real estate;

(4) The legal description of the commercial real estate as described in the representation agreement;

(5) The amount of the claimed lien expressed as either a specified sum, a percentage of the sales price, or a formula;

(6) The real estate license number of the principal broker;

(7) That the lien claimant has read the notice of claim of lien, knows its contents, and believes:

(A) The statements contained in the notice of claim of lien to be true and correct; and

(B) That the claim is made pursuant to a valid representation agreement and is not frivolous; and

(8) That the information contained in the notice of claim of lien is true and accurate to the knowledge of the signatory.

(b) The notice of claim of lien against proceeds shall be notarized.

(c) A copy of the representation agreement shall be attached to the notice of claim of lien against proceeds.

History. Acts 2005, No. 1944, § 1; substituted “principal broker” for “licensee” in (a)(1) and (6).
2011, No. 340, § 1.

Amendments. The 2011 amendment

18-48-806. Delivery of notice of claim of lien.

(a) Except for service of a complaint under § 18-48-807 or § 18-48-808, a notice required to be delivered to a party under this subchapter shall be delivered by:

(1) Any form of service of process permitted by Rule 4 of the Arkansas Rules of Civil Procedure;

(2) Registered or certified mail, return receipt requested; or

(3) Personal or electronic delivery and evidence of delivery in the form of a receipt or other paper or electronic acknowledgment by or from the party to whom the notice is delivered.

(b) Delivery of the notice is effective at the time of:

(1) Personal service;

(2) Personal or electronic delivery; or

(3) Three (3) days after deposit in the mail.

(c)(1) Notice to a principal broker or owner of commercial real estate may be sent to:

(A) The address of the principal broker or owner that is provided in the representation agreement; or

(B) Any other address contained in a written notice from the principal broker or owner to the party giving the notice.

(2) If no address can be found under the provisions of subdivision (c)(1) of this section, the notice may be given to:

(A) The principal broker at his or her most recent address of record with the Arkansas Real Estate Commission; and

(B) The owner at the address of the owner’s commercial real estate.

History. Acts 2005, No. 1944, § 1;
2011, No. 340, § 1.

Amendments. The 2011 amendment, in the introductory language of (a), substituted “a complaint under § 18-48-807 or § 18-48-808” for “process as required in a civil action subject to the Arkansas Rules of Civil Procedure”, inserted “required”,

and inserted “delivered” following “shall be”; substituted “Any form of service of process permitted by Rule 4 of the Arkansas Rules of Civil Procedure” for “Service of process” in (a)(1); deleted (a)(4); and substituted “principal broker” for “licensee” throughout (c).

18-48-807. Release of notice of claim of lien.

(a) If a principal broker records a notice of claim of lien against proceeds and knows or learns that he or she is not entitled to receive compensation under the terms of the representation agreement, the

principal broker shall record a written release of the notice of claim of lien against proceeds within five (5) days after:

- (1) Demand by the owner of the commercial real estate; or
- (2) Learning that the principal broker is not entitled to receive compensation under the terms of the representation agreement.

(b) If the amount claimed in the notice of claim of lien has been paid, a lien claimant shall promptly record a satisfaction or release of the notice of claim of lien within five (5) days after receipt of payment of the amount claimed in the notice of claim of lien.

(c)(1) In a disposition of commercial real estate, the escrow closing agent shall pay to the lien claimant the owner's net proceeds up to the amount claimed in the notice of claim of lien against proceeds.

(2) If the amount claimed in the notice of claim of lien is to be fully or partially paid to the lien claimant by the escrow closing agent upon disposition, the lien claimant shall submit a release of his or her notice of claim of lien against proceeds to the escrow closing agent who shall hold the release in escrow pending disposition and payment.

(d)(1)(A) A notice of claim of lien against proceeds recorded under this subchapter shall be released upon the recording of a receipt by the office in which the notice of claim of lien was recorded that shows a deposit of an amount equal to the lien claimed.

(B) The deposit shall be held pending a resolution of amounts due to the licensee and the owner.

(2) If the court determines in an action by the owner to compel delivery of the release by the lien claimant that the delay in providing the release was unjustified, the court shall:

- (A) Order the release of the notice of claim of lien; and
- (B) Award the owner the costs of the action, including a reasonable attorney's fee.

History. Acts 2005, No. 1944, § 1; 2011, No. 340, § 1.

Amendments. The 2011 amendment subdivided (a); in (a)(1), substituted "prin-

cipal broker" for "licensee" twice and inserted "or learns"; inserted (a)(2); and inserted "the owner" in (d)(2)(B).

18-48-808. Disputed claim — Order to show cause.

(a)(1) An owner of commercial real estate may dispute a recorded notice of claim of lien against proceeds filed under this subchapter by filing a complaint in the circuit court of the county where the commercial real estate or a portion of the commercial real estate is located for an order directing the principal broker to appear before the court and show cause why a release of the notice of claim of lien against proceeds should not be granted.

(2) If after a hearing, a court determines that the owner is:

- (A) Not obligated to pay the principal broker a commission under the terms of a representation agreement, it shall issue an order:
 - (i) Releasing the notice of claim of lien against proceeds; and
 - (ii) Awarding costs and a reasonable attorney's fee to the owner; or

(B) Obligated to pay the principal broker a commission under the terms of a representation agreement, the court shall issue an order awarding costs and a reasonable attorney's fee to the licensee.

(b)(1) A principal broker who has a lien on net rental proceeds under § 18-48-803, has recorded a notice of claim of lien against proceeds, and has complied with the requirements of this subchapter may file a complaint in the circuit court of the county where the commercial real estate or a portion of the commercial real estate is located for an order directing the owner to appear before the court and show cause why the relief requested in the complaint should not be granted.

(2) If after a hearing, the court determines that the owner is:

(A) Obligated to pay the principal broker a commission under the terms of a representation agreement, the court shall:

(i) Issue an order enjoining the owner from paying the net rental proceeds from the lease to any party other than the principal broker;

(ii) Order the owner to pay the net rental proceeds to the principal broker; and

(iii) Award a reasonable attorney's fee and expenses to the principal broker; or

(B) Not obligated to pay the licensee a commission under the terms of a representation agreement, the court shall issue an order awarding a reasonable attorney's fee and expenses to the owner.

(c)(1) A complaint authorized by subsection (a) or subsection (b) of this section is barred if not filed within twelve (12) months of the date that the notice of claim of lien against proceeds was recorded.

(2) A proceeding under this section shall not affect other rights and remedies available to the parties under this subchapter or otherwise.

History. Acts 2005, No. 1944, § 1; 2011, No. 340, § 1.

Amendments. The 2011 amendment substituted "principal broker" for "licensee" throughout the section; in (a)(1), deleted "or a licensee who has a lien on net proceeds under § 18-48-803, has recorded

a notice of claim of lien against proceeds, and has complied with the requirements of this subchapter" following the first occurrence of "real estate"; and substituted "is barred if not filed" for "shall be filed" in (c)(1).

18-48-809. Priority of lien claims.

If perfected prior to the recording of a notice of claim of lien against proceeds, the following liens have priority over a lien created under this subchapter:

(1) Statutory liens, mortgages, deeds of trust, assignments of rents, and other encumbrances, including all advances or charges made or accruing under statutory liens, mortgages, deeds of trust, assignments of rents, and other encumbrances, whether voluntary or obligatory; and

(2) Modifications, extensions, renewals, and replacements to any of the liens listed in subdivision (1) of this section.

History. Acts 2005, No. 1944, § 1.

A.C.R.C. Notes. Section 18-48-809 was

omitted from Acts 2011, No. 340, which purported to amend the entire subchapter.

A.C.R.C. has determined that it was not the intent to repeal § 18-48-809 and its omission was likely a clerical error.

CHAPTER 49

ENFORCEMENT OF MORTGAGES, DEEDS OF TRUST, AND VENDORS' LIENS

SECTION.

- 18-49-101. Limitation of actions.
- 18-49-102. Defense of payment or setoff.
- 18-49-103. Judgment.
- 18-49-104. Sale of property under court order and publication of notice of sales.

SECTION.

- 18-49-105. Proceeds of sale insufficient.
- 18-49-106. Redemption of real property.
- 18-49-107. [Repealed.]

Cross References. Loans secured by liens on agricultural lands, § 23-32-203.

Local actions, § 16-60-102.

Preservation of mortgaged property, appointment of receiver, § 16-117-208.

Statutory foreclosures, § 18-50-101 et seq.

Effective Dates. Acts 1899, No. 153, § 2: effective on passage.

Acts 1901, No. 158, § 2: effective on passage.

Acts 1911, No. 260, § 2: May 10, 1911. Emergency declared.

Acts 1935, No. 36, § 5: approved Feb. 15, 1935. Emergency clause provided: "It is hereby ascertained and declared that restrictions imposed by existing laws relative to notes secured by vendor's lien are tending to hinder and delay the alienation of real property in Arkansas and, therefore, an alteration of the present law being necessary for the public peace, health and

safety, an emergency is hereby declared to exist and this act shall take effect and be in full force from and after its passage."

Acts 1973, No. 604, § 4: Apr. 5, 1973. Emergency clause provided: "It is hereby found and determined by the General Assembly that the provisions of Section 1 of Act No. 260 of 1911, relating to the methods of giving notice that payment has been made upon an existing indebtedness are at this time inadequate and should be enlarged, as the present provisions for the giving of such notice are unduly restrictive, are a deterrent to the obtaining of financing for agricultural, commercial and industrial purposes in the State of Arkansas and that it is immediately necessary to correct this undesirable situation. Therefore, an emergency is hereby declared to exist and this Act shall be in effect from the date of its passage and approval."

RESEARCH REFERENCES

ALR. Defaulting vendee's right to recover contractual payments withheld by vendor as forfeited. 4 A.L.R.4th 993.

Statute as to effect of taking appeal, or staying execution, on right to redeem from execution or judicial sale. 44 A.L.R.4th 1229.

Am. Jur. 51 Am. Jur. 2d, Liens, § 79 et seq.

55 Am. Jur. 2d, Mort., § 449 et seq.

Ark. L. Rev. Conditional Sales in Arkansas, 4 Ark. L. Rev. 19.

Subordination of Mortgage Security to a Negotiable Promissory Note, 5 Ark. L. Rev. 183.

The Extent of the Debts Secured by a Mortgage in Arkansas, 9 Ark. L. Rev. 45.

The Old and the New: Article IX, 16 Ark. L. Rev. 145.

Uniform Commercial Code — Measure of Damages, 20 Ark. L. Rev. 391.

C.J.S. 53 C.J.S., Liens, § 46 et seq.

59 C.J.S., Mort., § 639 et seq.

18-49-101. Limitation of actions.

(a) In suits to foreclose or enforce mortgages, deeds of trust, or vendor's liens, it shall be sufficient defense that they have not been brought within the period of limitation prescribed by law for a suit on the debt or liability for the security of which they were given.

(b) When any payment is made on any existing indebtedness, before it is barred by the statute of limitations, the payment shall not operate to revive the debts or to extend the operations of the statute of limitations, with reference thereto, so far as it affects the rights of judgment lienholders and judgment creditors and third parties, unless the mortgagee, trustee, or beneficiary shall, prior to the expiration of the period of the statute of limitation, execute, acknowledge, and record a written instrument reflecting the amount and date of payments made or shall endorse a memorandum of the payment with date thereof on the margin of the record where the instrument is recorded, and the endorsement shall be attested and dated by the clerk.

(c)(1) In all cases in which an indebtedness is secured by any mortgage, deed of trust, or instrument in which a vendor's lien is retained, the mortgage, deed of trust, or vendor's lien may be enforced or foreclosed at any time within the period prescribed by law for foreclosing mortgages or deeds of trust so far as the property mentioned or described in the deed of trust, mortgage, or other instrument is concerned.

(2) However, no claim or debt against the estate of a dead person shall be probated against the estate, whether secured by mortgage, deed of trust, or instrument retaining a vendor's lien, or not, except within the time prescribed by law for probating claims against estates.

(d)(1) The holder of a vendor's lien, whether as the original beneficiary or as the assignee or transferee thereof, must note on the margin of the record where the vendor's lien is recorded payments relative to the indebtedness secured thereby.

(2) If the payments are not noted on the margin of the record, then the debt shall become barred, as to third parties, after five (5) years from the maturity of the indebtedness or after five (5) years from the date of the last payment, if any, which may be noted on the margin of the record, thereby subjecting evidences of indebtedness secured by vendor's lien to the same provisions and limitations provided by law in connection with evidences of indebtedness secured by mortgages or deeds of trust.

History. Acts 1911, No. 260, § 1; C. & M. Dig., § 7408; Acts 1935, No. 36, §§ 1, 2; 1937, No. 370, § 1; Pope's Dig., §§ 9465, 9466; Acts 1973, No. 604, § 1; A.S.A. 1947, §§ 51-1103, 51-1104.

Cross References. Agreements extending maturity date, § 18-40-103.

CASE NOTES

ANALYSIS

Constitutionality.

In General.

Applicability.

Acceleration Clauses.

Debt Barred.

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Estoppel.

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Payments.

—Endorsements.

— — Failure to Endorse.

— — Sufficiency.

Third Parties.

—Knowledge.

—Persons Not Protected.

Vendors' Liens.

Constitutionality.

Former similar law was constitutional. *Hill v. Gregory*, 64 Ark. 317, 42 S.W. 408 (1897); *Lester v. Richardson*, 69 Ark. 198, 62 S.W. 62 (1901) (preceding decisions under prior law).

In General.

This section covered the entire subject matter of Acts 1889, No. 58, p. 73, and worked an implied repeal thereof. *Coco v. Miller*, 193 Ark. 999, 104 S.W.2d 209 (1937).

Applicability.

Former similar law applied to mortgages with power of sale and deeds of trust when sought to be foreclosed by trustee's sale; and when it affirmatively appeared from the face of the mortgage that the debt was barred, and there were no marginal entries on the record to take the debt out of the operation of the statute, the right to foreclose was also barred as against third persons though payments had been made. *Hill v. Gregory*, 64 Ark. 317, 42 S.W. 408 (1897); *Lester v. Richardson*, 69 Ark. 198, 62 S.W. 62 (1901) (preceding decisions under prior law).

This section applies to debts secured by mortgage and not barred at the time of its passage or made thereafter and does not apply to mortgage debts barred at the time of its passage. *Rhodes v. Cannon*, 112 Ark. 6, 164 S.W. 752 (1914).

The statute of limitations as to mortgages does not apply to equitable mort-

gages. *Shapard v. Mixon*, 122 Ark. 530, 184 S.W. 399 (1916).

This section has no application where the property is pledged and delivered to the pledgee. *Hill v. Bush*, 192 Ark. 181, 90 S.W.2d 490 (1936).

This section did not apply where no extension agreements or payments were made on a note and it was not necessary to have them, foreclosure suit having been instituted within the statutory period of limitation. *First State Bank v. Cook*, 192 Ark. 213, 90 S.W.2d 510 (1936).

In action to foreclose mortgage, kept alive by its assumption by grantees in chain of title, made less than five years before institution of suit, this section was not applicable. *Webb v. Alexander*, 195 Ark. 727, 113 S.W.2d 1095 (1938).

Subsection (a) of this section, which bars a foreclosure action from being commenced after the expiration of the limitations period governing the underlying obligation, does not apply to a federal foreclosure action brought by the Farmers Home Administration. *United States v. Warren Brown & Sons Farms*, 868 F. Supp. 1129 (E.D. Ark. 1994).

Farm Service Agency was entitled to recovery on three defaulted notes because it filed suit within the applicable limitations period established by 28 U.S.C.S. § 2415(a); the limitations period under Arkansas law established under this section was inapplicable to such a lawsuit. *United States v. FJN Contrs., Inc.*, No. 08-CV-1065, 2009 U.S. Dist. LEXIS 90278 (W.D. Ark. Sept. 30, 2009).

Acceleration Clauses.

Acceleration clause contained in note and mortgage for benefit of payee and enforceable at his option did not start the statute of limitations running upon failure to make payment of interest. *Hodges v. Taft*, 194 Ark. 259, 106 S.W.2d 605 (1937).

Debt Barred.

Suit to foreclose mortgage was barred when the debt or liability secured by it was barred. *Holiman v. Hance*, 61 Ark. 115, 32 S.W. 488 (1895); *Whipple v. Johnson*, 66 Ark. 204, 49 S.W. 827 (1899); *Coleman v. Fisher*, 67 Ark. 27, 53 S.W. 671 (1899); *Goodman v. Pareira*, 70 Ark. 49, 66

S.W. 147 (1901); *Gatens v. Neely*, 70 Ark. 122, 66 S.W. 438 (1902) (preceding decisions under prior law).

Execution of a mortgage upon surrender of notes was an extension of time, and mortgage was not barred until action was barred on the original note. *Hance v. Holiman*, 69 Ark. 57, 60 S.W. 730 (1901) (decision under prior law).

Where a cause of action on a note was barred by the statute of limitations, a mortgage securing such note is likewise barred. *Taylor v. Cheairs*, 181 Ark. 4, 24 S.W.2d 852 (1930).

Where a promissory note was signed on March 15, 1982, with the first payment due on March 15, 1983, and where no payments were made, under the five-year statute of limitations plaintiffs were barred by law from recovering those payments that became due prior to March 13, 1986 in a foreclosure suit filed on March 13, 1991. *Karnes v. Marrow*, 315 Ark. 37, 864 S.W.2d 848 (1993).

Deceased Mortgages.

Judgment could not be rendered against an heir of a deceased mortgagor. *Harbison v. Vaughan*, 42 Ark. 539 (1884); *Pillow v. Sentelle*, 49 Ark. 430, 5 S.W. 783 (1887) (preceding decisions under prior law).

After the passage of this section, the period of limitations governing the foreclosure of mortgages and deeds of trust after the death of the mortgagor, either by suit in chancery or by proceedings under the power of sale incorporated in such instruments, was not that provided by the statute of nonclaim but the general statute of limitations applicable to the debt for which the security was given had the debtor not died. *England v. Spillers*, 128 Ark. 31, 193 S.W. 86 (1917).

A mortgage is enforceable after the mortgagor's death so long as the debt is not barred, regardless of the statute of nonclaim. *Burlingham v. Hutchins*, 184 Ark. 764, 43 S.W.2d 362 (1931).

The rights of the widow of a deceased mortgagor are subject to a mortgage existing at the time of the marriage, if foreclosure is sought before it is barred by limitations, and even if debt is barred by limitations and no foreclosure is brought, widow can assert no rights without paying debt. *Harris v. Mosley*, 195 Ark. 62, 111 S.W.2d 563 (1937).

Estoppel.

Where one buys land upon which there is an apparent valid mortgage of record, he buys subject to the mortgage and may not thereafter plead the statute of limitations, if the mortgage is not in fact barred, though by the record it apparently expired by failure to endorse payments. *Jimerson v. Reed*, 202 Ark. 490, 150 S.W.2d 747 (1941).

Bank which took mortgage containing warrant of title to mortgaged property against all claims except prior mortgage was estopped to plead the statute of limitations against prior mortgage when it became barred for failure to endorse credits on the margin thereof. *Bank of Atkins v. Griffin*, 205 Ark. 203, 168 S.W.2d 382 (1943).

Limitations Applicable.

The statute of limitations applicable to open accounts could not be pleaded against a debt secured by mortgage which recited that the defendant was indebted to the plaintiff in a certain sum. *Haney v. Holt*, 179 Ark. 403, 16 S.W.2d 463 (1929).

Payments.

Where period greater than statutory period elapsed between payments on past due mortgage note, claim of mortgagee under the mortgage was barred as to third parties. *Johnson v. Lowman*, 193 Ark. 8, 97 S.W.2d 86 (1936).

Where payments were made and credited on the note keeping it alive beyond the time suit was instituted, debt was not barred by limitations. *White v. White*, 198 Ark. 740, 131 S.W.2d 4 (1939).

Payment of taxes and insurance on mortgaged property within the period of limitation, under authority contained in the mortgage, extended statute of limitations. *Bell v. McIlroy*, 198 Ark. 1069, 132 S.W.2d 815 (1939); *Young v. Blocker*, 201 Ark. 802, 146 S.W.2d 902 (1941).

A recorded mortgage was not barred by limitations on the face of the record where the defendant purchased the land from the mortgagor before mortgage was barred by the record and where the debt was in fact kept alive by payments though not endorsed on the record. *R.S. Biggers & Co. v. Norman*, 209 Ark. 514, 190 S.W.2d 984 (1945).

—Endorsements.

Endorsement of payments was not necessary where the record of the mortgage

did not show that the mortgage was barred, although the debt secured would in fact be barred but for payments made upon the note secured. *Hoye v. Burford*, 68 Ark. 256, 57 S.W. 795 (1900) (decision under prior law).

Where endorsements were made upon the record of a mortgage or deed of trust, an action for the foreclosure of the mortgage would not be barred either as against the mortgagor or any third person until the debt secured by the mortgage was barred by the statute of limitations applicable thereto, and partial payments made and endorsed on the record of the mortgage continued the lien of the mortgage as against the rights of all third parties if made and endorsed before the debt was barred by the statute of limitations. *Wadley v. Ward*, 99 Ark. 212, 137 S.W. 808 (1911) (decision under prior law).

In order to extend the statutory bar on recorded mortgage liens, as against third parties, the burden and duty are placed upon the mortgagee to enter the payments and dates thereof on the margin of the record where the mortgage is recorded but there is no duty to enter new undertakings by the mortgagor on the record in order to extend the period of limitation as to third persons. *Christian Women's Bd. v. Clark*, 140 Ark. 262, 215 S.W. 631 (1919). (But see § 18-40-103).

The presence or absence of the endorsement of credits or other payments on the back of a note is not conclusive proof that payments tolling the statute were or were not made. *Schaefer v. Baker*, 181 Ark. 620, 27 S.W.2d 83 (1930).

Partial payments will keep alive a mortgage lien as between the parties and also as to third parties when the memorandum thereof is endorsed upon the record. *Trent v. Johnson*, 185 Ark. 288, 47 S.W.2d 12 (1932).

As between the mortgagor and the mortgagee, it is not necessary that payments on the mortgage debt be endorsed on the record in order to stop the running of the statute of limitations. *Tyson v. Mayweather*, 170 Ark. 660, 281 S.W. 1 (1926); *Wasson v. Beekman*, 188 Ark. 895, 68 S.W.2d 93 (1934); *Kansas City Life Ins. Co. v. Marsh*, 196 Ark. 1121, 121 S.W.2d 81 (1938).

Where action was barred as to prospective purchasers, it could not be revived by subsequent endorsement on the margin of

the record showing a payment previously made. *Johnson v. Lowman*, 193 Ark. 8, 97 S.W.2d 86 (1936).

Where mortgagor continued to make payments on a mortgage acquired by his wife, and she made the endorsements required by this section, the mortgage was kept alive against one to whom he gave a quitclaim deed. *Green v. Green*, 231 Ark. 218, 329 S.W.2d 411 (1959).

— — Failure to Endorse.

The failure to make endorsement of payments upon a mortgage upon the margin of the record does not operate to defeat the mortgage where it has been kept alive by a subsequent written agreement. *Austin v. Steele*, 68 Ark. 348, 58 S.W. 352 (1900) (decision under prior law); *Mullins v. Wilcox*, 124 Ark. 17, 186 S.W. 290 (1916).

Statute of limitations not extended where payments were not endorsed on margin of record. *Bank of Mulberry v. Sprague*, 185 Ark. 410, 47 S.W.2d 601 (1932); *Reed v. Pollard*, 190 Ark. 566, 79 S.W.2d 1001 (1935).

Effect of failure to make marginal notations of payments on record of mortgage before the bar of limitations attaches according to the record, is, as to third parties, to reduce the instrument to the status of an unrecorded mortgage. *Hamburg Bank v. Zimmerman*, 196 Ark. 849, 120 S.W.2d 380 (1938).

Mortgagor's attorneys who prior to institution of foreclosure suit received from the mortgagor a deed to an undivided one-half interest in the mortgaged land, took title free from the lien of the mortgages which had been kept alive by tax payments made by mortgagee which had not been endorsed upon the margin of the record, and attorneys' interest was not lost because, inter alia, they were not under duty to make inquiry which would have put them on notice that payment of taxes by mortgagee had kept the mortgages alive. *Polster v. Langley*, 201 Ark. 396, 144 S.W.2d 1063 (1940).

Where foreclosure suit on mortgage was dismissed seven years after its institution and filing of *lis pendens*, subsequent foreclosure suit was not barred by statute of limitations as to judgment creditor of mortgagor because of failure to make marginal notation of payment on mortgage record within statutory period from filing

of suit. *Mitchell v. Federal Land Bank*, 206 Ark. 253, 174 S.W.2d 671 (1943), superseded by statute as stated in, *Croft v. Croft*, 8 Ark. App. 20, 648 S.W.2d 511 (1983).

—Sufficiency.

Endorsement held insufficient to check the operation of the statute of limitations. *Clark v. Lesser*, 106 Ark. 207, 153 S.W. 112 (1913).

Endorsement held sufficient to extend statute of limitations. *Merchants' & Planters' Bank v. Ewan*, 181 Ark. 679, 27 S.W.2d 784 (1930).

Sufficiency of marginal endorsement upon mortgage record to comply with this section was unavailable to execution creditor if the note was not barred by the statute of limitations when the foreclosure suit of such creditor was filed. *Taylor v. Magnolia Loan & Inv. Co.*, 194 Ark. 732, 109 S.W.2d 442 (1937).

Third Parties.

One owning a royalty interest in land could plead the statute of limitations as against a foreclosure of a prior mortgage where he was not a party to the foreclosure and there was no endorsement on the mortgage record extending the time of maturity of the mortgage. *Arrington v. United Royalty Co.*, 188 Ark. 270, 65 S.W.2d 36 (1933).

The term "third party" as used in this section means a stranger to the mortgage. *Beith v. McKenzie*, 191 Ark. 353, 86 S.W.2d 176 (1935).

Where second mortgage did not refer to prior mortgage, which had been duly recorded and was not barred, second mortgagee was a third party within the meaning of this section and its mortgage was subject to the prior one only as long as the lien thereof was kept alive, so that purchase by second mortgagee, at its own foreclosure sale, after the lien of the first mortgage had expired, was not subject to the first mortgage. *Buckner State Bank v. Stager*, 195 Ark. 1072, 115 S.W.2d 1076 (1938).

Purchaser for value from grantee of purchaser under foreclosure of second mortgage was entitled to plead the statute of limitations upon proceedings to foreclose the first mortgage even though the original mortgagors did not interpose such defense. *Billingsley v. Pruitt*, 226 Ark. 577, 291 S.W.2d 498 (1956).

This section protects only third-party purchasers for value whose rights are adversely affected by the failure of the first mortgagee to record a written instrument of payment. *Bank of N.Y. v. University Partners, Ltd.*, 719 F. Supp. 1479 (W.D. Ark. 1989).

The rationale of the "stranger to the transaction" rule is to protect a subsequent mortgagee from being adversely affected by actions of other parties of which he had no notice, not to allow a subsequent mortgagee with notice of the pre-existing mortgage and extensive involvement in the affairs of the debtor to obtain a greater interest in the mortgaged property than was contemplated. *Bank of N.Y. v. University Partners, Ltd.*, 719 F. Supp. 1479 (W.D. Ark. 1989).

—Knowledge.

When a debt secured by a mortgage was apparently barred by limitations and no payment which would stay the limitation was endorsed on the margin of the record of the mortgages, it became, as to third persons, as an unrecorded mortgage and constituted no lien upon the mortgaged property as against them, notwithstanding they had actual knowledge of the execution of the mortgage. *Morgan v. Kendrick*, 91 Ark. 394, 121 S.W. 278 (1909) (decision under prior law).

A third party acquiring an interest in real estate on which there is an outstanding mortgage may invoke the benefit of this section notwithstanding he may have actual knowledge of the existence of the mortgage. *Beith v. McKenzie*, 191 Ark. 353, 86 S.W.2d 176 (1935).

Where endorsements are not made as required by this section, the rights of third parties are not affected by payments, even though they may have actual knowledge. *Johnson v. Lowman*, 193 Ark. 8, 97 S.W.2d 86 (1936).

Purchaser from mortgagor, his grantee, and purchaser from grantee's administratrix at sale ordered by probate court, were all third parties protected against mortgagee's successor where no notations of payment were made on the record for statutory period after maturity of note secured by the mortgage, mere knowledge of debt being insufficient to prevent the statutory bar. *Hamburg Bank v. Zimmerman*, 196 Ark. 849, 120 S.W.2d 380 (1938).

Purchaser without actual knowledge of mortgage foreclosure suit or constructive

notice since *lis pendens* notice had not been given, being a third party to the mortgage, took title free from the mortgage lien even though he acquired title by quitclaim deed. *Shouse v. Scovill*, 200 Ark. 441, 139 S.W.2d 240 (1940).

Husband of deceased vendor came within the class of third parties and it was immaterial whether he had actual knowledge of the mortgage and the payment thereon. *Matthews v. Mullins*, 201 Ark. 579, 145 S.W.2d 718 (1940).

Where payments tolling the statute of limitations were made by mortgagor but not endorsed on margin of record, after statutory period from due date of indebtedness described in the mortgage, junior mortgage became superior even though junior mortgagee knew of prior mortgage, since it was not shown that he was other than a stranger or third person to such mortgage. *Clark v. Shockley*, 205 Ark. 507, 169 S.W.2d 635 (1943).

Bank, which advanced additional money on first mortgage loan after knowledge that agent of mortgagor had made unrecorded payment within statutory period on prior mortgage, was entitled to recover entire amount of loan, since prior mortgage was in effect a prior unrecorded mortgage. *Tucker v. Atkinson*, 219 Ark. 921, 245 S.W.2d 388 (1952).

—Persons Not Protected.

Where a wife joins with her husband in executing a deed of trust on land belonging to her to secure a debt of the husband, she is not a "third party." *Harper v. McGoogan*, 107 Ark. 10, 154 S.W. 187 (1913).

Heirs held not "third parties." *Armstrong v. Armstrong*, 181 Ark. 597, 27 S.W.2d 88 (1930).

Where a mortgagee brought a foreclosure suit and filed a *lis pendens* notice before the debt was barred, one who subsequently purchased the mortgaged land from the mortgagor was not an innocent purchaser nor a third party. *Wasson v. Beekman*, 188 Ark. 895, 68 S.W.2d 93 (1934).

Execution creditor purchasing at own execution sale was not a third person within this section. *Citizens Bank & Trust Co. v. Garrott*, 192 Ark. 599, 93 S.W.2d 319 (1936).

Wife of mortgagee's tenant who purchased mortgaged premises from mortgagor was not a third party within the

meaning of this section. *Tyler v. Niven*, 194 Ark. 538, 108 S.W.2d 893 (1937).

Heirs and persons holding under voluntary conveyances are not third parties within this section. *Kansas City Life Ins. Co. v. Marsh*, 196 Ark. 1121, 121 S.W.2d 81 (1938).

Where mortgagor made payments which had effect of reviving the instrument as between himself and mortgagee's assignee, and which payments were not endorsed on record, upon mortgagor's death, his widow and heirs took the same title he had and the mortgage was binding upon them since they were not third parties. *Kansas City Life Ins. Co. v. Marsh*, 196 Ark. 1121, 121 S.W.2d 81 (1938).

Mortgagor's vendor who claimed a vendor's lien though deed recited that purchase money had been paid could not contend that mortgagee's claim was barred by the statute of limitations because no entries of payment were made on the record, since he was not a third party within the meaning of this section. *Blackwood v. Davidson*, 198 Ark. 1055, 132 S.W.2d 799 (1939).

Grantee of mortgaged premises who bought subject to the mortgage was not a third party within the meaning of this section so as to be entitled to its protection, and his widow and heirs have no better standing as third parties than he did. *Henry v. Coe*, 200 Ark. 44, 137 S.W.2d 897 (1940).

A son, who had purchased mortgaged property from his father, could not avail himself of the defense in a foreclosure proceeding of the fact that no payment had been noted on the margin of the record, since he was not a third party within the meaning of this section. *Denham v. Lack*, 200 Ark. 455, 139 S.W.2d 243 (1940).

Son of mortgagor to whom property was transferred as trustee for benefit of mother and who managed property was not a third party within meaning of this section, hence he was bound by payments made on mortgage by stepson of mortgagor who had previously managed property. *Tucker v. Atkinson*, 219 Ark. 921, 245 S.W.2d 388 (1952).

Decedent who received quitclaim deed to land on which there was a mortgage that was not barred, thereby taking it subject to the mortgage, was not a "third

party" within this section. *Green v. Green*, 231 Ark. 218, 329 S.W.2d 411 (1959).

Vendors' Liens.

Where land was sold and notes given for the purchase price and a bond for title was executed by the vendor, a trust relationship arose and the statute of limitations did not begin to run in favor of either party until there had been a determination of such relations. *Williams v. Young*, 71 Ark. 164, 71 S.W. 669 (1903) (decision under prior law).

This section as re-enacted, so as to require the endorsement of payments upon a deed retaining a vendor's lien, was prospective in its operation so that debt was valid and subsisting for a full five years subsequent to payment made before the passage of the section, but in order for further payments to further toll the stat-

ute, memorandum thereof must be endorsed upon the record in the manner prescribed by this section. *Coco v. Miller*, 193 Ark. 999, 104 S.W.2d 209 (1937).

An action on a promissory note executed for part of the purchase price of land was not barred by limitations where the suit was instituted within statutory period of the due date of the note. *Leverett v. Williamson*, 199 Ark. 910, 136 S.W.2d 478 (1940).

Ejectment action by vendor to recover possession because of purchaser's failure to make deferred payments was not barred by this statute where a payment on the indebtedness was made prior to the expiration of the statute of limitations before the action was filed. *Williams v. Baker*, 207 Ark. 731, 182 S.W.2d 753 (1944).

18-49-102. Defense of payment or setoff.

(a) In any action in a justice court or circuit court of this state in which it is attempted to foreclose any mortgage or deed of trust or to replevy, under a mortgage, deed of trust, or other instrument any personal property, the defendant in the action shall have the right to prove or show any payment or setoff under the mortgage, deed of trust, or other instrument.

(b) Judgment shall be rendered for the property or the balance due thereon, and the defendant may pay the judgment for the balance due and costs within ten (10) days and satisfy the judgment and retain the property.

History. Acts 1901, No. 158, § 1, p. 303; C. & M. Dig., §§ 7410, 8654a; Pope's

Dig., §§ 9468, 11388; A.S.A. 1947, § 51-1102.

CASE NOTES

ANALYSIS

Purpose.
Applicability.

Purpose.

This section was passed to permit an adjustment of accounts between mortgagee and mortgagor, and remedy the former law permitting recovery in replevin suits in such cases, where any amount was due, putting the mortgagor to a further suit to adjust the accounts after his property had been taken. *Neal v. Brandon*, 74 Ark. 320, 85 S.W. 776 (1905).

Applicability.

The mortgagor shall have the right to setoff where he brings an action against the mortgagee for possession of the mortgaged property, and the mortgagee by cross-complaint asserts its right to foreclose the mortgage. *Geiser Mfg. Co. v. Davis*, 110 Ark. 449, 162 S.W. 59 (1913).

This section applies where possession is taken by the mortgagee to foreclose and a tender is made of the amount. *Barton v. Bowlin*, 111 Ark. 123, 163 S.W. 502 (1914).

Cited: *Fore v. Chenault*, 168 Ark. 747, 271 S.W. 704 (1925).

18-49-103. Judgment.

(a) It shall not be necessary in any action upon a mortgage or lien to enter an interlocutory judgment or give time for the payment of money, or for doing any other act. In such cases, final judgment may be given in the first instance.

(b) In the foreclosure of a mortgage, a sale of the mortgaged property shall be ordered in all cases.

(c) In an action on a mortgage or lien, the judgment may be rendered for the sale of the property and for the recovery of the debt against the defendant personally.

(d) Whenever a mortgagee reasonably believes that mortgaged property has or will be affected by a release or threatened release of any hazardous substance including, but not limited to, those defined by 42 U.S.C. § 9601(14) and (22), or § 8-7-403(a)(8) [repealed], or § 8-7-503, the mortgagee may proceed against the mortgagor personally to recover the debt, without need to first seek a sale of the mortgaged property.

History. Civil Code, §§ 405, 406, 408; §§ 51-1105, 51-1106, 51-1108; Acts 1989, C. & M. Dig., §§ 6240-6242; Pope's Dig., No. 260, § 1. §§ 8196-8198, 9474-9476; A.S.A. 1947,

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CASE NOTES

ANALYSIS

In General.
Interlocutory Orders.
Personal Judgments.
Sale Required.

In General.

Subsection (b) is mandatory. Loftis v. Edwards, 235 Ark. 30, 356 S.W.2d 742 (1962).

A real estate mortgage is extinguished after both the foreclosure of the mortgage and the sale of the mortgaged property. In re Gordon, 161 B.R. 459 (Bankr. E.D. Ark. 1993).

This section provides for the sale of the property subject to a mortgage, not the execution of a deed. Born v. Hodges, 101 Ark. App. 139, 271 S.W.3d 526 (2008).

Interlocutory Orders.

Subsection (a) does not prohibit the entry of an interlocutory order, being per-

missive. Loftis v. Edwards, 235 Ark. 30, 356 S.W.2d 742 (1962).

Where judgment impressed lien upon property and ordered property to be sold if judgment was not timely paid but named no commissioner and fixed no time for sale, it was an interlocutory judgment which was permissible under subsection (a), and court was required thereafter to complete the decree of sale under the provisions of subsection (b) which is mandatory, even at a subsequent term. Loftis v. Edwards, 235 Ark. 30, 356 S.W.2d 742 (1962).

Personal Judgments.

In foreclosing a mortgage against the heir of the mortgagor, it is error to render a personal decree against him for debt. Harbison v. Vaughan, 42 Ark. 539 (1884).

On affirmance of a decree enforcing foreclosure of a mortgage on land and rendering a personal decree against the appellant, judgment would be entered

against the sureties on supersedeas bond for the amount of money, without waiting for the foreclosure decree to be enforced by sale of the property. *Kirby v. Young*, 145 Ark. 507, 224 S.W. 970 (1920).

A vendor foreclosing his lien for the purchase money is entitled to personal judgment against the purchaser in the first instance and not merely after report of the sale, and may have an ancillary remedy, such as garnishment, without waiting to exhaust his security. *Bank of Eudora v. Ross*, 168 Ark. 754, 271 S.W. 703 (1925).

In a mortgage foreclosure in which the complainant sought a personal judgment, a foreclosure decree omitting any provision for a deficiency judgment was held *res judicata* as to the plaintiff's right to recover a personal judgment for a deficiency after sale. *Pfeiffer v. Missouri State Life Ins. Co.*, 177 Ark. 1013, 8 S.W.2d 505 (1928).

Court having jurisdiction to foreclose the mortgage had the incidental jurisdic-

tion to render a personal judgment for the debt it secured. *Husband v. Crockett*, 195 Ark. 1031, 115 S.W.2d 882 (1938); *Peek v. Brickey*, 300 Ark. 354, 779 S.W.2d 152 (1989).

It was error for the trial court to deny a personal judgment against the original mortgagor in a foreclosure action against such mortgagor and a grantee to whom he had conveyed the real estate subject to the mortgage upon default of such grantee. *Pulaski Fed. Sav. & Loan Ass'n v. Woolsey*, 242 Ark. 612, 414 S.W.2d 633 (1967).

Sale Required.

Trial court erred when entering a default judgment in a foreclosure action because it ordered a buyer to quitclaim a deed to property to two sellers to satisfy a mortgage; there was no authority to do such under this section. *Born v. Hodges*, 101 Ark. App. 139, 271 S.W.3d 526 (2008).

Cited: *Cupples Bros. v. Federal Land Bank*, 951 F.2d 883 (8th Cir. 1991); *Tripp v. Miller*, 82 Ark. App. 236, 105 S.W.3d 804 (2003).

18-49-104. Sale of property under court order and publication of notice of sales.

(a)(1) Sales of personal property made by order of the court shall be on a credit of three (3) months.

(2) Sales of real property made by court order shall be on a credit of not less than three (3) months nor more than six (6) months, or on installments equivalent to not more than four (4) months' credit on the whole, to be determined by the court.

(b)(1) In all sales on credit, the purchaser shall execute a bond, with good surety, to be approved by the person making the sale, and the bond shall have the force of a judgment.

(2) In sales of real property, a lien shall be retained on the property for its price.

(c)(1) The mortgagee, trustee, or vendor shall publish a notice of the sale in a newspaper published and having a general circulation in the county in which the property is situated or, if this is not available, then in a newspaper of general statewide daily publication one (1) time.

(2) The publication shall be at least ten (10) days prior to the sale.

History. Civil Code, § 407; C. & M. A.S.A. 1947, § 51-1109; Acts 1997, No. Dig., § 6243; Pope's Dig., §§ 8199, 9477; 1190, § 1.

CASE NOTES

ANALYSIS

Applicability.

Bond.

Confirmation.

Terms.

Applicability.

This section has no application to partition sales. *Davis v. Whittaker*, 38 Ark. 435 (1882).

This section has no application to the sale of the assets of an insolvent bank in process of liquidation. *Citizens' Bank & Trust Co. v. Raines*, 125 Ark. 17, 187 S.W. 932 (1916).

This section does not apply where real estate, conveyed in fraud of creditors, is ordered sold for purpose of satisfying judgment. *Jennings v. Tankersley Bros. Packing Co.*, 218 Ark. 776, 238 S.W.2d 625 (1951).

This section is not applicable to federal foreclosures where security interest is held in some manner by the United States government. *United States v. Thompson*, 438 F.2d 254 (8th Cir. 1971).

Bond.

Where cash bond was withdrawn by the purchaser after court refused to confirm sale, the withdrawal amounted to an acceptance of the judgment refusing to confirm sale and party could not appeal. *Jones v. Rogers*, 222 Ark. 523, 261 S.W.2d 649 (1953).

Confirmation.

Purchaser is protected against objections to notice of sale by presumption of regularity attaching to court's action in confirming sale. *Coulter v. First Fed. Sav. & Loan Ass'n*, 195 Ark. 100, 111 S.W.2d 921 (1937).

Terms.

All sales by order of court must be on credit. *Welch v. Hicks*, 27 Ark. 292 (1871); *Jackman v. Beck*, 37 Ark. 125 (1881).

The failure to set out the terms of a judicial sale in the decree is not jurisdictional. *Neely v. Lee Wilson & Co.*, 126 Ark. 253, 190 S.W. 431 (1916).

The maximum period of credit is prescribed by this section and where the decree is silent on that point, it will be construed with reference to this section. *De Yampert v. Manley*, 127 Ark. 153, 191 S.W. 905 (1917).

Where sale of the land was ordered, the sale should be on a credit of not less than that statutorily required. *Scrape v. Robinson*, 202 Ark. 264, 149 S.W.2d 943 (1941).

Judicially ordered foreclosure sale was required to be on a credit of the period required by this section, even though under the Uniform Commercial Code, sale of collateral not made by judicial action may be in any way which is commercially reasonable. *Nineteen Corp. v. Guaranty Fin. Corp.*, 246 Ark. 400, 438 S.W.2d 685 (1969).

Cited: *Almobarak v. McCoy*, 84 Ark. App. 152, 137 S.W.3d 440 (2003).

18-49-105. Proceeds of sale insufficient.

If the whole of mortgaged property does not sell for a sum sufficient to satisfy the amount due, an execution may be issued against the defendant as on ordinary judgments.

History. Rev. Stat., ch. 101, § 17; C. & M. Dig., § 6244; Pope's Dig., §§ 8200, 9478; A.S.A. 1947, § 51-1110.

CASE NOTES

Extinguishment of Judgment.

When the proceeds of a foreclosure sale are insufficient to satisfy the judgment, the judgment is not extinguished. *Cupples*

Bros. v. Federal Land Bank, 951 F.2d 883 (8th Cir. 1991).

A real estate mortgage is extinguished after both the foreclosure of the mortgage

and the sale of the mortgaged property. In re Gordon, 161 B.R. 459 (Bankr. E.D. Ark. 1993).

Cited: Kirby v. Young, 145 Ark. 507,

224 S.W. 970 (1920); Bank of Eudora v. Ross, 168 Ark. 754, 271 S.W. 703 (1925); Tripp v. Miller, 82 Ark. App. 236, 105 S.W.3d 804 (2003).

18-49-106. Redemption of real property.

(a)(1) In all cases where real property is sold under an order or decree of the circuit court or a court exercising circuit jurisdiction in the foreclosure of mortgages and deeds of trust, the mortgagor or his or her heirs or legal representatives shall have the right to redeem the property so sold.

(2) This may be done at any time within one (1) year from the date of sale, by the payment of the amount for which the property was sold, together with interest thereon, at the rate borne by the decree or judgment, and the cost of foreclosure and sale.

(b) The mortgagor may waive the right of redemption in the mortgage or deed of trust so executed and foreclosed.

History. Acts 1899, No. 153, § 1, p. 279; C. & M. Dig., § 7411; Pope's Dig., § 9473; A.S.A. 1947, § 51-1111.

CASE NOTES

ANALYSIS

Applicability.

Bankruptcy.

Cure.

Equity of Redemption.

Persons Entitled to Redeem.

Redemption from Mortgage.

Rents and Profits.

Waiver.

Applicability.

This section does not apply to a sale under a vendor's lien. Priddy & Chambers v. Smith, 106 Ark. 79, 152 S.W. 1028 (1912).

This section does not apply to a foreclosure of an equitable mortgage in the shape of an absolute deed. Lewis v. Muense, 136 Ark. 200, 206 S.W. 318 (1918).

Though a sale of land under contract to convey the same on payment of the purchase price constitutes a reservation of the legal title merely as security for the payment of the price and though equity treats this form of transaction as having same effect as a mortgage, it is not a mortgage in the strict sense of the term and does not fall within the redemption statute. Standley v. Mason, 148 Ark. 141, 229 S.W. 3 (1921).

After confirmation of a judicial sale, the possibility of redemption ceases to exist. In re Gordon, 161 B.R. 459 (Bankr. E.D. Ark. 1993).

Bankruptcy.

The right to redemption of foreclosed property within statutory period of the foreclosure was not a legal or equitable interest in property which would be included in a debtor's bankruptcy estate, and the foreclosed mortgagee could not retain possession of the property without paying the cash price of redemption. In re Pettit, 18 B.R. 816 (Bankr. E.D. Ark. 1982).

Where the corporate debtor failed to redeem the foreclosed property prior to filing a bankruptcy petition, the debtor had no legal or equitable interest in the property and such property was not bankruptcy estate property. In re Sugarloaf Props., Inc., 286 B.R. 705 (Bankr. E.D. Ark. 2002).

Chapter 13 debtor had no legal or equitable interest in a residence to include in his bankruptcy estate, as both his equitable right of redemption and his statutory right of redemption under Arkansas law had expired prior to the date he filed his bankruptcy petition. However, debtor

remained in possession of the residence at the time his petition was filed, and his mere possessory interest as a tenant at sufferance, even without any accompanying legal interest, was protected by the automatic stay. *Farmers Bank & Trust Co. v. Wells* (In re Wells), 536 B.R. 264 (Bankr. E.D. Ark. 2015).

Cure.

The right to redeem the property under state law is not the equivalent of curing the default; under Arkansas law, cure requires a lump-sum payment. In re Gordon, 161 B.R. 459 (Bankr. E.D. Ark. 1993).

Equity of Redemption.

Independent of statute, there is in equity a right to redeem in apt time by the mortgagor or any one claiming under him. *Shinn v. Barrie*, 182 Ark. 366, 31 S.W.2d 540 (1930).

A clause in an option contract, in effect a mortgage, making time of the essence of the contract to repurchase foreclosed property from the mortgagee, did not dispose of the equity of redemption which can be disposed of only by foreclosure, conveyance, or laches. *Baugh v. Taylor*, 184 Ark. 545, 42 S.W.2d 992 (1931).

Persons Entitled to Redeem.

Where a mortgagor of land died and thereafter the mortgagee foreclosed the mortgage and bought the land, it was proper to permit the mortgagor's heir, before confirmation, to redeem the land in the absence of a waiver of the right of redemption by the mortgagor. *Taylor v. Shell*, 102 Ark. 649, 145 S.W. 539 (1912).

A junior mortgagee who was not a party to the foreclosure proceedings brought by the senior mortgagee may redeem by paying or tendering the whole mortgage debt. *Smith v. Simpson*, 129 Ark. 275, 195 S.W. 1067 (1917).

A subsequent purchaser of an undivided interest in minerals who was not made a party to the proceedings for foreclosure of a pre-existing deed of trust was not entitled to redeem the entire property from the foreclosure sale and become subrogated to the right of the purchaser at such sale where he did not make an attempt to redeem his proportionate part of the premises and the purchaser refused to apportion the debt so as to permit redemption of the subsequent purchaser's part.

Rowland v. Griffin, 179 Ark. 421, 16 S.W.2d 457 (1929).

Attempted redemption by one claiming to be a partner of the original owner amounted to an equitable assignment to the person purportedly redeeming and the redemption was invalid. *Wilson v. Kitchens*, 218 Ark. 845, 239 S.W.2d 270, cert. denied, 342 U.S. 897, 72 S. Ct. 232, 96 L. Ed. 672 (1951).

Redemption from Mortgage.

The courts recognize the distinction between redeeming from a mortgage and the statutory right of redemption from a sale under the mortgage. In redeeming from a mortgage, it is necessary to pay what is due. *Smith v. Simpson*, 129 Ark. 275, 195 S.W. 1067 (1917).

Rents and Profits.

A purchaser at a mortgage sale is not entitled to recover from a mortgagor in possession the rents and profits during the period allowed for redemption. *Deisch v. Moore*, 97 Ark. 262, 133 S.W. 1035 (1911).

A mortgagor who is deprived of rents and profits during term of mortgage is entitled to recover rents if he redeems the instrument. *Oliver v. Deffenbaugh*, 166 Ark. 118, 265 S.W. 970 (1924).

Waiver.

Intention to waive right to redeem must be expressed in mortgage. *Tate v. Dinsmore*, 117 Ark. 412, 175 S.W. 528 (1915).

Foreclosure decree cuts off redemption where mortgage contains waiver. *Wilkinson v. James*, 164 Ark. 475, 262 S.W. 319 (1924).

No statutory right of redemption from mortgage foreclosure exists where mortgagor waived his right to redeem. *Shinn v. Barrie*, 182 Ark. 366, 31 S.W.2d 540 (1930).

The right to redemption may be waived in the mortgage or deed of trust. In re Gordon, 161 B.R. 459 (Bankr. E.D. Ark. 1993).

A waiver of the right of redemption in a mortgage contract operates as an absolute bar to a mortgagor's right to redeem within one year of sale. *Dellinger v. First Nat'l Bank*, 333 Ark. 460, 970 S.W.2d 223 (1998).

Cited: *Handford v. Edwards*, 89 Ark. 151, 115 S.W. 1143 (1909); *Phillips v. Jones*, 103 Ark. 550, 146 S.W. 513 (1912);

Schlumpf v. Shofner, 210 Ark. 452, 196 S.W.2d 747 (1946); Buford v. Martin, 256 Ark. 31, 505 S.W.2d 489 (1974); Tim

Wargo & Sons v. Equitable Life Assurance Soc'y, 34 Ark. App. 216, 809 S.W.2d 375 (1991).

18-49-107. [Repealed.]

Publisher's Notes. This section, concerning sale under power in mortgage or deed of trust, was repealed by Acts 1987, No. 53, § 17. The section was derived from Acts 1879, No. 71, §§ 1, 2, p. 94;

1883, No. 88, § 1, p. 157; 1891, No. 119, § 1, p. 198; 1895, No. 3, § 1, p. 4; C. & M. Dig., §§ 7404-7407; Pope's Dig., §§ 9461-9464; A.S.A. 1947, §§ 51-1112—51-1114. For current law, see § 18-50-101 et seq.

CHAPTER 50

STATUTORY FORECLOSURES

SECTION.

- 18-50-101. Definitions.
- 18-50-102. Parties authorized to foreclose mortgage or deed of trust.
- 18-50-103. Conditions to exercise of power of sale.
- 18-50-104. Prerequisites for foreclosure sale — Contents of notice of sale — Persons to receive notice.
- 18-50-105. Publication of notice.
- 18-50-106. Trustee's affidavit.
- 18-50-107. Manner of sale.
- 18-50-108. Effect of sale.

SECTION.

- 18-50-109. Disposition of proceeds of sale.
- 18-50-110. [Repealed.]
- 18-50-111. Form and effect of trustee's or mortgagee's deed.
- 18-50-112. Deficiency judgment.
- 18-50-113. Request for notice.
- 18-50-114. Reinstatement of mortgage or deed of trust.
- 18-50-115. Implied powers in mortgages.
- 18-50-116. Miscellaneous provisions.
- 18-50-117. Foreign corporations and other entities.

Cross References. Abandonment of personal property, § 18-27-103.

Enforcement of mortgages, etc., § 18-49-101 et seq.

Effective Dates. Acts 1987, No. 53, § 19: Feb. 18, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present laws regarding foreclosures are awkward, requiring appraisals before the sale and giving the homeowner a one year statutory right of redemption that may not be waived; whereby this Act would provide an efficient and fair procedure for the liquidation of defaulted mortgage loans to the benefit of both the homeowner and the mortgage lender. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1989, No. 532, § 7: Mar. 14, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that there exists certain inconsistencies in the language of the statutory foreclosure procedures found in Arkansas Code § 18-50-101 et seq. which create some confusion in the process of foreclosure whereby this act will more clearly address the needs of the public. Therefore, an emergency is hereby declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1999, No. 983, § 16: Mar. 31, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that it is immediately necessary for the fair and efficient administration of this act that, among other things, sales be considered final, and all rights of the grantor or mortgagor,

be terminated, immediately upon the conclusion of the public foreclosure auction. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 2003, No. 1303, § 3: Apr. 14, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that foreign entities not authorized to do business in the

State of Arkansas are availing themselves to the provisions of the Statutory Foreclosure Act of 1987; that often times it is to the detriment of Arkansas citizens; and that this act is immediately necessary because these entities should be authorized to do business in the State of Arkansas before being able to use the Statutory Foreclosure Act of 1987. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

RESEARCH REFERENCES

Ark. L. Rev. Legislative Note, Nonjudicial Foreclosure in Arkansas with the Statutory Foreclosure Act of 1987, 41 Ark. L. Rev. 373.

Lynn Foster, Symposium Article: Statutory Foreclosures in Arkansas: The Law

and Recent Developments, 66 Ark. L. Rev. 111 (2013).

U. Ark. Little Rock L.J. Survey — Property, 10 U. Ark. Little Rock L.J. 605.

CASE NOTES

Applicability.

The Arkansas Rules of Civil Procedure do not apply to the nonjudicial procedure codified in this chapter. *Union Nat'l Bank v. Nichols*, 305 Ark. 274, 807 S.W.2d 36 (1991).

Cited: *Transportation Properties, Inc. v. Central Glass & Mirror of N.W. Ark., Inc.*, 38 Ark. App. 60, 827 S.W.2d 667 (1992); *Henson v. Fleet Mtg. Co.*, 319 Ark. 491, 892 S.W.2d 250 (1995).

18-50-101. Definitions.

As used in this chapter:

(1) "Beneficiary" means the person named or otherwise designated in a deed of trust as the person for whose benefit a deed of trust is given or his or her successor in interest;

(2) "Deed of trust" means a deed conveying real property in trust to secure the performance of an obligation of the grantor named in the deed or an obligor that is secured by the deed of trust to a beneficiary and conferring upon the trustee a power of sale for breach of an obligation of the grantor or obligor contained in the deed of trust;

(3) "Grantor" means the person conveying an interest in real property by a mortgage or deed of trust as security for the performance of an obligation secured by the mortgage or deed of trust;

(4) "Mortgage" means the grant of an interest in real property to be held as security for the performance of an obligation by the mortgagor or other person;

(5) "Mortgage company" means any private, state, or federal entity that in the usual course of its business is either the mortgagee or beneficiary of a deed of trust or mortgage;

(6) "Mortgage loan servicer" means an entity that holds itself out as being able to service loans secured by liens or mortgages encumbering real property;

(7) "Mortgagee" means the person holding an interest in real property as security for the performance of an obligation secured by a mortgage or his or her attorney-in-fact appointed pursuant to this chapter;

(8) "Mortgagor" means the person granting an interest in real property as security for the performance of an obligation secured by a mortgage;

(9) "Obligor" means a person owing an obligation that is secured by a mortgage or deed of trust;

(10) "Sale" means the public auction conducted pursuant to § 18-50-107;

(11) "Trust property" means the property encumbered by a mortgage or deed of trust; and

(12) "Trustee" means any person or legal entity to whom legal title to real property is conveyed by deed of trust or his or her successor in interest.

History. Acts 1987, No. 53, § 1; 1989, No. 532, § 1; 1999, No. 983, § 1; 2011, No. 885, § 1; 2011, No. 901, § 1.

Amendments. The 2011 amendment by No 885 inserted "or her" in (1); in (2), deleted "or any other person" preceding "named in the deed", inserted "or an obligor that is secured by the deed of trust", and inserted "or obligor"; added "secured by the mortgage or deed of trust" in (3); inserted "secured by a mortgage" in present (7) and (8); added the definition for "Obligor" and redesignated the remaining subdivisions accordingly; and deleted "and shall be deemed concluded when the highest bid is accepted by the person conducting the sale" at the end of present (10) [see now § 18-50-107(d)].

The 2011 amendment by No. 901 inserted "or her" in (1); in (2), deleted "or any other person" preceding "named in the deed", inserted "or an obligor that is secured by the deed of trust", and inserted "or obligor"; added "secured by the mortgage or deed of trust" in (3); inserted "secured by a mortgage" in present (7) and (8); inserted the definitions for "Mortgage loan servicer" and "Obligor" and redesignated the remaining subdivisions accordingly; and deleted "and shall be deemed concluded when the highest bid is accepted by the person conducting the sale" at the end of present (10) [see now § 18-50-107(d)].

CASE NOTES

ANALYSIS

Irregularities in Foreclosure.

Judicial Review.

Production of Original Note.

Sale.

Irregularities in Foreclosure.

Irregularities in a foreclosure proceeding under this subchapter may be grounds to set the sale aside. *Matlock v. Lomas Mtg. U.S.A., Inc.*, 154 B.R. 721 (Bankr. E.D. Ark. 1993); *In re Henson*, 157 B.R. 867 (Bankr. W.D. Ark. 1993).

Judicial Review.

A statutory foreclosure is subject to a judicial review. *Matlock v. Lomas Mtg. U.S.A., Inc.*, 154 B.R. 721 (Bankr. E.D. Ark. 1993).

Production of Original Note.

Arkansas statutes governing foreclosure of property through a private sale do not specifically require that the foreclosing party produce a physical copy of the original promissory note; apart from there being no requirement that the creditor produce the original note, the creditor submitted an affidavit stating that the original note was in the creditor's possession, and given this, and the fact that the borrowers failed to create an issue of fact, the circuit court correctly granted summary judgment to the creditor on the borrowers' claim to void any interest the creditor might have in the mortgage and

note. *Anderson v. CitiMortgage, Inc.*, 2014 Ark. App. 683, 450 S.W.3d 251 (2014).

Sale.

Bankruptcy debtor was entitled to cure a mortgage default under 11 U.S.C.S. § 1322(c)(1) where the foreclosure sale was not completed before debtor's bankruptcy, even though this section deemed the sale complete upon bid acceptance which occurred prior to the debtor's bankruptcy, since a sale under bankruptcy law required an irrevocable transfer of the property through the completed foreclosure process; under state law, after bid acceptance the foreclosure trustee could reject the bid up to the time of delivery of the trustee's deed for any reason and the successful bidder's right to possession could not be enforced until the deed was recorded, and thus the sale was not complete until the trustee's deed was delivered and recorded. *In re Jenkins*, 422 B.R. 175 (Bankr. E.D. Ark. 2010).

Cited: *Hickman v. Union Nat'l Bank*, 154 B.R. 730 (Bankr. W.D. Ark. 1993); *In re Cook*, 253 B.R. 249 (Bankr. E.D. Ark. 2000); *In re Brown*, 282 B.R. 880 (Bankr. E.D. Ark. 2002); *In re Sugarloaf Props., Inc.*, 286 B.R. 705 (Bankr. E.D. Ark. 2002).

18-50-102. Parties authorized to foreclose mortgage or deed of trust.

(a) Parties authorized to foreclose a mortgage or deed of trust under this chapter are limited to:

(1) A trustee or attorney-in-fact who is an active licensed member of the Bar of the Supreme Court of the State of Arkansas or a law firm among whose members includes such an attorney if the attorney or law firm maintains an office that:

(A) Is located within this state;

(B) Is accessible to the public during regular business hours; and

(C) Has the ability to accept funds from a grantor, mortgagor, or obligor to reinstate or pay off a mortgage or deed of trust;

(2) A state-chartered bank, nationally chartered bank, state-chartered or federally chartered savings and loan association, state-chartered or federally chartered credit union, or a mortgage loan company subject to licensing, supervision, and auditing by a federal agency, a government-sponsored enterprise, and the Bank Commissioner or Securities Commissioner, as applicable, as an approved mortgage loan servicer authorized to do business under the laws of the State of Arkansas if the state-chartered bank, nationally chartered bank, state-chartered or federally chartered savings and loan association, state-

chartered or federally chartered credit union, or mortgage loan company:

(A) Has a physical business location open for business for normal banking hours located within the State of Arkansas;

(B) Is either the holder or the mortgage loan servicer for the holder of a note secured by a mortgage or deed of trust; and

(C) Does not collect a fee or cost for any action taken under this chapter unless authorized by a court order; or

(3) An agency or authority of the State of Arkansas where not otherwise prohibited by law.

(b)(1) The beneficiary may appoint a successor trustee at any time by filing a substitution of trustee for record with the recorder of the county in which the trust property is situated.

(2) The new trustee shall succeed to all the power, duties, authority, and title of the original trustee and any previous successor trustee.

(3) The beneficiary, by express provision in the substitution of a trustee, may ratify and confirm actions taken on its behalf by the new trustee prior to the recording of the substitution of the trustee.

(c) The substitution shall identify the deed of trust by stating the names of the original parties thereto, the date of recordation, and the book and page where recorded or the recorder's document number. The substitution shall also state the name of the new trustee and shall be executed and duly acknowledged by all the beneficiaries or their successors in interest.

(d) A mortgagee may delegate his or her powers and duties under this chapter to an attorney-in-fact, whose acts shall be done in the name of and on behalf of the mortgagee.

(e) The appointment of an attorney-in-fact by a mortgagee shall be made by a duly executed, acknowledged, and recorded power of attorney that shall identify the mortgage by stating the names of the original parties thereto, the date of recordation, and the book and page where recorded or the recorder's document number.

(f) A substitution of trustee or power of attorney shall be recorded before any trustee's or mortgagee's deed executed by the substituted trustee or attorney-in-fact is recorded.

History. Acts 1987, No. 53, § 2; 1989, No. 532, § 2; 1999, No. 983, § 2; 2003, No. 1303, § 2; 2011, No. 901, § 2.

Amendments. The 2011 amendment rewrote (a); and deleted the former last sentence in (d).

RESEARCH REFERENCES

Ark. L. Rev. Dale A. Whitman & Drew Milner, Symposium Article: Foreclosing on Nothing: The Curious Problem of the Deed of Trust Foreclosure Without Entitlement to Enforce the Note, 66 Ark. L. Rev. 21 (2013).

Lynn Foster, Symposium Article: Statutory Foreclosures in Arkansas: The Law

and Recent Developments, 66 Ark. L. Rev. 111 (2013).

Emily C. Goins, Case Note: Foreign Corporation Registration and the Ability to Perform Non-Judicial Foreclosures in Arkansas in Light of JPMorgan Chase Bank v. Johnson, 67 Ark. L. Rev. 435 (2014).

U. Ark. Little Rock L. Rev. Survey of Legislation, 2003 Arkansas General Assembly, Property Law, Statutory Foreclo-

sure Law, 26 U. Ark. Little Rock L. Rev. 459.

CASE NOTES

ANALYSIS

In General.
Mortgagees.

In General.

Arkansas Statutory Foreclosure Act in subdivision (a)(2) of this section provides that a bank may be authorized to do business in Arkansas either by state or federal law; the Wingo Act, § 4-27-1501 et seq., specifies that a foreign corporation may obtain authority to transact business in Arkansas by obtaining a certificate from the Arkansas Secretary of State; and the Arkansas banking statutes provide that in some instances an out-of-state bank must obtain a certificate from the Arkansas Bank Commissioner. JPMorgan

Chase Bank, N.A. v. Johnson, 470 B.R. 829 (E.D. Ark. 2012), *aff'd*, JPMorgan Chase Bank, N.A. v. Johnson, 719 F.3d 1010 (8th Cir. 2013).

Mortgagees.

National banking association was authorized to avail itself of the Arkansas Statutory Foreclosure Act even though it was not registered with the Arkansas Secretary of State where it was chartered by the Office of the Comptroller of the Currency, and as such, it was authorized to do business within the state by virtue of § 18-50-117. JPMorgan Chase Bank, N.A. v. Johnson, 470 B.R. 829 (E.D. Ark. 2012), *aff'd*, JPMorgan Chase Bank, N.A. v. Johnson, 719 F.3d 1010 (8th Cir. 2013).

18-50-103. Conditions to exercise of power of sale.

A beneficiary or mortgagee may not initiate a foreclosure under this chapter unless:

(1) The deed of trust or mortgage is filed for record with the recorder of the county in which the trust property is situated;

(2)(A) The beneficiary or mortgagee:

(i) Has personal knowledge of the records and information provided under this subdivision (2); and

(ii) At least ten (10) days before initiating the foreclosure has provided by standard mail to the grantor, mortgagor, or obligor at the address of the property encumbered by the mortgage or deed of trust or the mailing address of the grantor, mortgagor, or obligor:

(a) A true and correct copy of the note with all required endorsements, the mortgage, or the deed of trust;

(b) The name of the holder and the physical location of the original note;

(c) A true and correct copy of the original mortgage or deed of trust and if in the possession of the beneficiary or mortgagee, each assignment or allonge of the mortgage or deed of trust;

(d) Information, including the applicable telephone number and Internet address, regarding the availability to the grantor, mortgagor, or obligor of each program for loan modification assistance or forbearance assistance offered:

(1) Solely by the beneficiary or the mortgagee; or

(2) By a government agency if the beneficiary or mortgagee participates in the government agency's program; and

(e) If the default is the result of the failure to make payment, a payment history showing the date of default.

(B) If a true and correct copy of the original note, mortgage, deed of trust, or an assignment or allonge of the note, mortgage, or deed of trust is lost or otherwise unavailable, the beneficiary or mortgagee may, instead of providing true and correct copies of the note, mortgage, deed of trust, or assignment or allonge of the note, mortgage, or deed of trust, provide a statement that the document is lost or otherwise unavailable, and shall recite the good faith efforts the beneficiary or mortgagee has made to locate the document.

(C) The duties of the beneficiary or mortgagee to provide information under this subdivision (2) are not delegable to the beneficiary's trustee or the mortgagee's attorney-in-fact;

(3) There is a default by the mortgagor, grantor, or obligor with respect to any provision in the mortgage or deed of trust that authorizes sale in the event of default of the provision; and

(4) No action has been instituted to recover the debt or any part of it secured by the mortgage or deed of trust or, if such action has been instituted, the action has been dismissed.

History. Acts 1987, No. 53, § 3; 1999, No. 983, § 3; 2011, No. 885, § 2.

Amendments. The 2011 amendment, in the introductory language, substituted "beneficiary" for "trustee" and substituted

"initiate a foreclosure under this chapter" for "sell the trust property"; inserted (2), deleted former (3) and (5), and redesignated the remaining subdivisions accordingly; and rewrote present (3).

RESEARCH REFERENCES

ALR. Necessity of Production of Original Note Involved in Mortgage Foreclosure — Twenty-First Century Cases. 86 A.L.R.6th 411.

Ark. L. Notes. Nate Coulter, The Impact of the 2012 National Mortgage Settlement's Servicing Standards, 2013 Ark. L. Notes 1084.

Ark. L. Rev. Dale A. Whitman & Drew Milner, Symposium Article: Foreclosing on Nothing: The Curious Problem of the Deed of Trust Foreclosure Without Entitlement to Enforce the Note, 66 Ark. L. Rev. 21 (2013).

CASE NOTES

ANALYSIS

Legislative Intent.
Notice of Default.
Sebastian County.

Legislative Intent.

The General Assembly intended for all documents relating to the same piece of real property be filed in the same location; consequently, the General Assembly intended such documents to be filed with the recorder in the district which the property is situated. *Henson v. Fleet Mtg. Co.*, 319 Ark. 491, 892 S.W.2d 250 (1995).

Notice of Default.

Where notice of default gave as the place of sale "Sebastian County Courthouse," which encompasses two distinct locations for the place of sale, the notice, in essence specifying two possible locations for the sale, was deficient. *Henson v. Fleet Mtg. Co.*, 319 Ark. 491, 892 S.W.2d 250 (1995).

Strictly construing non-judicial foreclosure law, the court set aside the sale of certain real property as the bank failed to include the correct address in the notice of default; thus, the notice failed to satisfy

the requirements of § 18-50-104, and sale was not authorized pursuant to this section. In re Gatlin, 357 B.R. 519 (Bankr. W.D. Ark. 2006).

the recording requirements of this section are involved. Henson v. Fleet Mtg. Co., 319 Ark. 491, 892 S.W.2d 250 (1995).

Sebastian County.

The two districts of Sebastian County are, in effect, separate counties, so far as

18-50-104. Prerequisites for foreclosure sale — Contents of notice of sale — Persons to receive notice.

(a) The trustee or mortgagee may not sell the trust property unless:

(1) The mortgagee, trustee, or beneficiary has filed for record with the recorder of the county in which the trust property is situated a duly acknowledged notice of default and intention to sell containing the information required by subsection (b) of this section;

(2) A period of at least sixty (60) days has elapsed since the recording of the notice of default and intention to sell; and

(3)(A)(i) The beneficiary or mortgagee has certified to its trustee or attorney-in-fact under § 18-50-102 that each mortgagor, grantor, or obligor who applied for loan modification or forbearance assistance has been notified that the mortgagor, grantor, or obligor does not meet the criteria for loan modification or forbearance assistance under any program offered by:

(a) The beneficiary or mortgagee; or

(b) A government agency if the beneficiary or mortgagee participates in the government agency's program.

(ii) The notice shall be sent to the property address or mailing address of the mortgagor, grantor, or obligor by certified and first-class mail at least ten (10) business days before the sale.

(B) The duties of the beneficiary or mortgagee under subdivision (a)(3)(A) of this section are not delegable to the beneficiary's trustee or the mortgagee's attorney-in-fact.

(b) The mortgagee's or trustee's notice of default and intention to sell shall set forth:

(1) The names of the parties to the mortgage or deed of trust;

(2) A legal description of the trust property and, if applicable, the street address of the property;

(3) The book and page numbers where the mortgage or deed of trust is recorded or the recorder's document number;

(4) The default for which foreclosure is made;

(5) The mortgagee's or trustee's intention to sell the trust property to satisfy the obligation, including in conspicuous type a warning as follows: "YOU MAY LOSE YOUR PROPERTY IF YOU DO NOT TAKE IMMEDIATE ACTION";

(6) The time, date, and place of sale; and

(7) The name, address, and telephone number of the party initiating foreclosure.

(c) The mortgagee's or trustee's notice of default and intention to sell shall be mailed within thirty (30) days of the recording of the notice by

certified mail, postage prepaid, and by first-class mail, postage prepaid, to the address last known to the mortgagee or the trustee or beneficiary of the following persons:

- (1) The mortgagor, grantor, and obligor of the deed of trust;
 - (2) Any successor in interest to the mortgagor or grantor whose interest appears of record or whose interest the mortgagee or the trustee or beneficiary has actual notice;
 - (3) Any person having a lien or interest subsequent to the interest of the mortgagee or trustee when that lien or interest appears of record or when the mortgagee, the trustee, or the beneficiary has actual notice of the lien or interest; and
 - (4) Any person requesting notice, as provided in § 18-50-113.
- (d) The disability, incapacity, or death of any person to whom notice must be given under this section shall not delay or impair in any way the mortgagee's or trustee's right to proceed with a sale, provided that the notice has been given in the manner required by this section to the guardian or conservator or to the administrator or executor, as the case may be.

History. Acts 1987, No. 53, § 4; 1999, No. 983, § 4; 2011, No. 885, § 3.

Amendments. The 2011 amendment inserted present (a) and (b)(7) and redese-

igned the remaining subsections accordingly; and inserted "and obligor" in present (c)(1).

RESEARCH REFERENCES

ALR. Necessity of Production of Original Note Involved in Mortgage Foreclo-

sure — Twenty-First Century Cases. 86 A.L.R.6th 411.

CASE NOTES

ANALYSIS

Due Process Guarantees.
Mailing of Notice.
Place of Sale.

Due Process Guarantees.

Debtor, who had defaulted on her mortgage, alleged that the notice provisions of § 18-50-104 failed to comport with due process requirements; however, there was no state action involved in the foreclosure procedure, and mere passage of the Arkansas Statutory Foreclosure Act did not mean that there was state action or state officials involved. *Parker v. BancorpSouth Bank*, 369 Ark. 300, 253 S.W.3d 918 (2007).

Mailing of Notice.

Calculating the period of time within which notice of default must be mailed involves counting ten days from the day

the Trustee's Notice of Default and Intention to Sell is filed with the recorder of the county, and the rule is that the day of the act or event from which the designated period of time begins to run is not to be included in the count. *Union Nat'l Bank v. Nichols*, 305 Ark. 274, 807 S.W.2d 36 (1991).

Strictly construing non-judicial foreclosure law, the court set aside the sale of certain real property as the bank failed to include the correct address in the notice of default; thus, the notice failed to satisfy the requirements of this section and sale was not authorized pursuant to § 18-50-103. *In re Gatlin*, 357 B.R. 519 (Bankr. W.D. Ark. 2006).

Reading this section and § 18-50-105 together, the U.S. Bankruptcy Court for the Western District of Arkansas, Texarkana Division, concluded that the notice that must be published in the newspaper, at the county courthouse, and on the in-

ternet is the notice of default and intention to sell and, therefore, must contain a legal description of the trust property and, if applicable, the street address of the property. In re Gatlin, 357 B.R. 519 (Bankr. W.D. Ark. 2006).

Place of Sale.

Where notice of default gave as the place of sale “Sebastian County Court-

house,” which encompasses two distinct locations for the place of sale, the notice, in essence specifying two possible locations for the sale, was deficient. Henson v. Fleet Mtg. Co., 319 Ark. 491, 892 S.W.2d 250 (1995).

Cited: Ellis v. State Farm Bank, F.S.B., 2009 Ark. App. 569 (2009).

18-50-105. Publication of notice.

The mortgagee or trustee shall publish the notice:

(1) In a newspaper of general circulation in the county in which the trust property is situated or in a newspaper of general statewide daily publication one (1) time a week for four (4) consecutive weeks prior to the date of sale. The final publication shall be no more than ten (10) days prior to the sale;

(2) By employing a third-party posting provider to post notice at the place at the county courthouse where foreclosure sales are customarily advertised and conducted; and

(3) By employing a third-party Internet foreclosure sale notice information service provider.

History. Acts 1987, No. 53, § 5; 1989, No. 532, § 3; 1999, No. 983, § 5; 2001, No. 1196, § 1.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2001 Arkansas General Assembly, Property Law, 24 U. Ark. Little Rock L. Rev. 549.

CASE NOTES

Content of Notice.

Reading § 18-50-104 and this section together, the U.S. Bankruptcy Court for the Western District of Arkansas, Texarkana Division, concluded that the notice that must be published in the newspaper, at the county courthouse, and on the internet is the notice of default and inten-

tion to sell and, therefore, must contain a legal description of the trust property and, if applicable, the street address of the property. In re Gatlin, 357 B.R. 519 (Bankr. W.D. Ark. 2006).

Cited: Ellis v. State Farm Bank, F.S.B., 2009 Ark. App. 569 (2009).

18-50-106. Trustee’s affidavit.

On or before the date the mortgagee or trustee conducts the sale, a duly acknowledged affidavit of mailing and publication of the notice of default and intention to sell shall be filed for record with the recorder of the county in which the trust property is situated.

History. Acts 1987, No. 53, § 6.

18-50-107. Manner of sale.

(a) The sale shall be held on the date and at the time and place designated in the notice of default and intention to sell, except that the sale shall:

(1) Be held between 9:00 A.M. and 4:00 P.M.;

(2) Be held either at the premises of the trust property or at the front door of the county courthouse of the county in which the trust property is situated; and

(3) Not be held on a Saturday, Sunday, or a legal holiday.

(b)(1)(A) Any person, including the mortgagee and the beneficiary, may bid at the sale.

(B) The trustee may bid for the beneficiary but not for himself or herself.

(2) The mortgagee or trustee shall engage a third party that is licensed to sell real estate under the Real Estate License Law, § 17-42-101 et seq., and licensed to act as an auctioneer under the Auctioneer's Licensing Act, § 17-17-101 et seq., to conduct the sale and act at the sale as the auctioneer.

(3) No bid shall be accepted that is less than two-thirds ($\frac{2}{3}$) of the entire indebtedness due at the date of sale.

(c)(1) The person conducting the sale may postpone the sale from time to time.

(2)(A) In every such case, notice of postponement shall be given by:

(i) Public proclamation thereof by that person; or

(ii) Written notice of postponement posted at the time and place last appointed for the sale.

(B)(i) No other notice of the postponement need be given unless the sale is postponed for longer than thirty (30) days beyond the date designated in the notice.

(ii) In that event, notice thereof shall be given pursuant to § 18-50-104.

(d) The sale is concluded when the highest bid is accepted by the person conducting the sale.

(e)(1) Unless otherwise agreed to by the trustee or mortgagee, the purchaser shall pay at the time of sale the price bid.

(2) Interest shall accrue on any unpaid balance of the price bid at the rate specified in the note secured by the mortgage or deed of trust.

(3) Within ten (10) days after the sale, the mortgagee or trustee shall execute and deliver the trustee's deed or mortgagee's deed to the purchaser.

(4) The mortgagee or beneficiary shall receive a credit on its bid for:

(A) The amount representing the unpaid principal owed;

(B) Accrued interest as of the date of the sale;

(C) Advances for the payment of taxes, insurance, and maintenance of the trust property; and

(D) Costs of the sale, including reasonable trustee's and attorney's fees.

(f)(1) The purchaser at the sale shall be entitled to immediate possession of the property.

(2)(A) Possession may be obtained by filing a complaint in the circuit court of the county in which the property is situated and attaching a copy of the recorded trustee's or mortgagee's deed, whereupon the purchaser shall be entitled to an ex parte writ of assistance.

(B) Alternatively, the purchaser may bring an action for forcible entry and detainer under § 18-60-301 et seq.

(C) In either event, the provisions of § 18-50-116(d) shall apply.

History. Acts 1987, No. 53, § 7; 1999, No. 983, §§ 6, 7; 2011, No. 885, § 4; 2011, No. 901, § 3.

Amendments. The 2011 amendment by No. 885 inserted present (d) and redesignated the remaining subsections accordingly; and substituted "is situated" for "lies" in present (f)(2)(A).

The 2011 amendment by No. 901 inserted "that is licensed to sell real estate

under the Real Estate License Law, § 17-42-101 et seq., and licensed to act as an auctioneer under the Auctioneer's Licensing Act, § 17-17-101 et seq." in (b)(2); inserted present (d) and redesignated the remaining subsections accordingly; and substituted "is situated" for "lies" in present (f)(2)(A).

CASE NOTES

ANALYSIS

Applicability.
Appraisement.
Debtor's Interest.
Effect of Noncompliance.
Finality of Sale.
Objections to Bankruptcy Plan.
Place of Sale.
Purchase by Mortgagee.

Applicability.

Former statute did not apply to sales under decree of court. *Martin v. Ward*, 60 Ark. 510, 30 S.W. 1041 (1895); *Southwestern Ark. & Indian Terr. R.R. v. Hays*, 63 Ark. 355, 63 Ark. 355, 38 S.W. 665 (1897); *Gregory v. Rubel*, 184 Ark. 55, 41 S.W.2d 771 (1931) (preceding decisions under prior law).

Appraisement.

No deductions were to be made in the appraisement for prior liens. *Ellenbogen v. Griffey*, 55 Ark. 268, 18 S.W. 126 (1892) (decision under prior law).

A sale of land under a power contained in a mortgage was void where the appraisers and the justice of the peace who appointed them lived in a different county from that in which the land was located. *Raines v. Graham*, 70 Ark. 490, 69 S.W. 551 (1902) (decision under prior law).

A sale without appraisalment was void. *Craig v. Meriwether*, 84 Ark. 298, 105 S.W. 585 (1907); *Lesser v. Reeves*, 142 Ark. 320, 219 S.W. 15 (1920) (preceding decisions under prior law).

An unaccepted offer of a mortgagor to redeem from a sale of land under a power in a mortgage which was invalid by reason of failure to comply with statutory requirements as to appraisalment of the land was not a ratification of the sale, and did not prevent the mortgagee from taking steps to procure a sale at which a valid title could be obtained. *Craig v. Meriwether*, 84 Ark. 298, 105 S.W. 585 (1907) (decision under prior law).

Debtor's Interest.

Where property had been foreclosed on and sold before the date of the filing of the petition in bankruptcy, the debtor had no legal right or interest in the property, nor even a right of redemption; the only possible interest of the debtor, and thus of the estate, under 11 U.S.C. § 541, was what has been described by courts as a "shadowy" tenancy at sufferance. *Hickman v. Union Nat'l Bank*, 154 B.R. 730 (Bankr. W.D. Ark. 1993).

Effect of Noncompliance.

If a mortgagor filed a bill under the former right to redeem from a sale not

made in accordance with former statute, he waived the irregularities, unless he assailed them in his bill. *Dailey v. Abbott*, 40 Ark. 275 (1883) (decision under prior law).

A trustee's deed was invalid when it failed to show land brought two-thirds of appraised value. *Meunse v. Harper*, 70 Ark. 309, 67 S.W. 869 (1902) (decision under prior law).

Where a mortgage, with power in a trustee to sell on default, provided that the trustee's deed should be taken as prima facie true and the trustee's deed recited a regular appraisal and sale of the land and there was no proof that a purchaser of the land had notice of irregularities in the appraisal or sale, the latter's title was upheld. *Manchester v. Goeswich*, 95 Ark. 582, 130 S.W. 526 (1910) (decision under prior law).

Finality of Sale.

A nonjudicial foreclosure sale of real property is final upon the acceptance of the highest bid when the bidder is ready, able, and in fact offering to tender the funds to the mortgagee. *In re Bland*, 227 B.R. 163 (Bankr. E.D. Ark. 1998).

A statutory foreclosure sale conducted pursuant to §§ 18-50-101 et seq. is complete when a trustee's or mortgagee's deed is recorded. *In re Tomlin*, 228 B.R. 916 (Bankr. W.D. Ark. 1999), superseded by statute as stated in, *In re Cook*, 253 B.R. 249 (Bankr. E.D. Ark. 2000).

18-50-108. Effect of sale.

(a)(1) A sale made by a mortgagee or trustee shall foreclose and terminate all interest in the trust property of all persons to whom notice is given under § 18-50-104 and of any other person claiming by, through, or under the person. A failure to give notice to any person entitled to notice shall not affect the validity of the sale as to persons notified.

(2) A person entitled to notice, but not given notice, shall have the rights of a person not made a defendant in a judicial foreclosure.

(b) A sale shall terminate all rights of redemption, and no person shall have a right to redeem the trust property after a sale, notwithstanding that the deed to and possession of the trust property have yet to be delivered.

(c)(1) No notice shall be required to be given to any person claiming an interest subsequent to the filing of the notice of default and intention to sell as set forth in § 18-50-104.

Objections to Bankruptcy Plan.

Where the bank had foreclosed on debtor's home and was active in the debtor's bankruptcy case, the neglect in failing to object to the bankruptcy plan constituted acquiescence in the debtor's possession of the home for the life of the plan. *Hickman v. Union Nat'l Bank*, 154 B.R. 730 (Bankr. W.D. Ark. 1993).

Place of Sale.

Where notice of default gave as the place of sale "Sebastian County Courthouse," which encompasses two distinct locations for the place of sale, the notice, in essence specifying two possible locations for the sale, was deficient. *Henson v. Fleet Mtg. Co.*, 319 Ark. 491, 892 S.W.2d 250 (1995).

Purchase by Mortgagee.

A mortgagee selling under power of sale could become a purchaser when the mortgage permitted it, and the sale was in all respects fairly and faithfully conducted. *Ellenbogen v. Griffey*, 55 Ark. 268, 18 S.W. 126 (1892) (decision under prior law).

When mortgagee purchased at a void sale and went into possession, his status was that of a mortgagee in possession. *Stallings v. Thomas*, 55 Ark. 326, 18 S.W. 184 (1892) (decision under prior law).

Cited: *In re Cook*, 253 B.R. 249 (Bankr. E.D. Ark. 2000); *In re Brown*, 282 B.R. 880 (Bankr. E.D. Ark. 2002).

(2) The filing of the notice of default and intention to sell shall have the same force and effect as the filing of a lis pendens in a judicial proceeding.

History. Acts 1987, No. 53, § 8; 1999, No. 983, § 8.

CASE NOTES

ANALYSIS

Debtor's Interest.
Redemption.
Tenant at Sufferance.

Debtor's Interest.

Where property had been foreclosed on and sold before the date of the filing of the petition in bankruptcy, the debtor had no legal right or interest in the property, nor even a right of redemption; the only possible interest of the debtor, and thus of the estate, under 11 U.S.C. § 541, was what has been described by courts as a "shadowy" tenancy at sufferance. *Hickman v. Union Nat'l Bank*, 154 B.R. 730 (Bankr. W.D. Ark. 1993).

Redemption.

As to right of redemption under former statute, see *Wood v. Holland*, 64 Ark. 104, 40 S.W. 704 (1897); *Allen v. Swoope*, 64 Ark. 576, 44 S.W. 78 (1898); *Danenhauer v. Dawson*, 65 Ark. 129, 46 S.W. 131

(1898); *Fields v. Danehower*, 65 Ark. 392, 46 S.W. 938 (1898); *Lambright v. Bales*, 139 Ark. 48, 213 S.W. 2 (1919); *Modica v. Combs*, 158 Ark. 149, 249 S.W. 567 (1923) (preceding decisions under prior law).

As to entitlement to rents and profits under former right of redemption, see *Dailey v. Abbott*, 40 Ark. 275 (1883); *Danenhauer v. Dawson*, 65 Ark. 129, 46 S.W. 131 (1898); *Adler-Goldman Comm'n Co. v. Herren*, 65 Ark. 229, 45 S.W. 543 (1898); *North Am. Trust Co. v. Burrow*, 68 Ark. 584, 60 S.W. 950 (1901) (preceding decisions under prior law).

Tenant at Sufferance.

At common law the rightful owner of property had an election to evict a tenant at sufferance. *Hickman v. Union Nat'l Bank*, 154 B.R. 730 (Bankr. W.D. Ark. 1993).

Cited: *In re Cook*, 253 B.R. 249 (Bankr. E.D. Ark. 2000); *In re Brown*, 282 B.R. 880 (Bankr. E.D. Ark. 2002).

18-50-109. Disposition of proceeds of sale.

The trustee or mortgagee shall apply the proceeds of the sale as follows:

- (1) To the expenses of the sale, including compensation of the trustee or mortgagee and a reasonable fee by the attorney;
- (2) To the indebtedness owed;
- (3) To all persons having recorded liens subsequent to the interest of the trustee or mortgagee as their interests may appear in the order of the priority; and
- (4) The surplus, if any, to the grantor of the trust deed or to the successor in interest of the grantor entitled to the surplus.

History. Acts 1987, No. 53, § 9.

18-50-110. [Repealed.]

Publisher's Notes. This section, concerning the affidavit of sale, was repealed

by Acts 1999, No. 983, § 9. The section was derived from Acts 1987, No. 53, § 10.

18-50-111. Form and effect of trustee's or mortgagee's deed.

(a)(1) The trustee's or mortgagee's deed shall contain recitals of compliance with the requirements of this chapter relating to the exercise of the power of sale and sale of the trust property, including recitals concerning mailing and publication of notice of default and intention to sell and the conduct of the sale.

(2) Upon the filing of the deed for record with the recorder of the county in which the trust property is situated, the recitals shall be prima facie evidence of the truth of the matters set forth therein, but the recitals shall be conclusive in favor of a purchaser for value in good faith relying upon them.

(b) The trustee's or mortgagee's deed shall convey to the purchaser all right, title, and interest in the trust property the mortgagor or grantor had or had the power to convey at the time of the execution of the mortgage or deed of trust, together with all right, title, and interest in the mortgagor or grantor or their successors in interest acquired after the execution of the mortgage or deed of trust, and the conveyance shall be deemed effective and relate back to the time of the sale.

History. Acts 1987, No. 53, § 11; 1999, No. 983, § 10.

CASE NOTES**ANALYSIS**

Construction.
Title.

Construction.

Statutory framework makes clear that legal or equitable rights must be asserted before a foreclosure sale is held or the claim will be forever barred or terminated, except in cases where fraud or the failure to strictly comply with the applicable statutory provisions can be established. *Brown v. Fed. Home Loan Mortg. Corp.*, 2013 Ark. App. 574, 430 S.W.3d 125 (2013).

Title.

Under subsection (b), holder of first deed of trust obtained all right, title and interest in the subject property when the trustee's deed was recorded. *Matlock v. Lomas Mtg. U.S.A., Inc.*, 154 B.R. 721 (Bankr. E.D. Ark. 1993).

Mortgagor correctly argued that it held title to the debtors' residence pursuant to a sale that satisfied the promissory note excuted by the debtors. *In re Henson*, 157 B.R. 867 (Bankr. W.D. Ark. 1993).

Cited: *Ellis v. State Farm Bank, F.S.B.*, 2009 Ark. App. 569 (2009).

18-50-112. Deficiency judgment.

(a)(1) At any time within twelve (12) months after a sale under this chapter, a money judgment may be sought for the balance due upon the obligation for which a mortgage or deed of trust was given as security.

(2) In such action, the plaintiff shall set forth in his or her complaint, and shall have the burden of proving, the entire amount of indebtedness which was secured by the mortgage or deed of trust, the amount for which the trust property was sold, and the fair market value of the trust property at the date of sale, together with interest from the date of sale, costs, and attorney's fees.

(b) Judgment shall not exceed the lesser of the following:

(1) The amount for which the indebtedness due at the date of sale, with interest from the date of sale, costs, and trustee's and attorney's fees, exceeds the fair market value of the trust property; or

(2) The amount for which the indebtedness due at the date of sale, with interest from the date of sale, costs, and trustee's and attorney's fees, exceeds the amount for which the trust property was sold.

History. Acts 1987, No. 53, § 12.

18-50-113. Request for notice.

(a) At any time subsequent to the recordation of a mortgage or deed of trust and prior to a recording of a notice of default and intention to sell under the mortgage or deed, any person desiring a copy of any such notice may file for record with the recorder of the county where the trust property is situated a duly acknowledged request for a copy of any notice of default and intention to sell.

(b) The request shall contain the name and address of the person requesting a copy of the notice and shall identify the mortgage or deed of trust by stating the names of the parties thereto, the date of recordation of the mortgage or deed, the book and page number where the mortgage or deed is recorded, or the recorder's document number.

(c) The recorder shall index the request so that the name of the mortgagor or of the grantor in the deed of trust is indexed as the grantor and the name of the requesting party is indexed as the grantee.

(d) No request, statement, or notation placed on record pursuant to this section shall affect the title to the trust property or be deemed notice to any person that any person so recording the request has any right, title, or interest in or lien or charge upon that property.

History. Acts 1987, No. 53, § 13.

18-50-114. Reinstatement of mortgage or deed of trust.

(a)(1) Whenever all or a portion of the principal sum of any obligation secured by a mortgage or deed of trust, prior to the maturity date fixed in such obligation, has become due or has been declared due by reason of a breach or default in the performance of any obligation secured by the mortgage or deed of trust, including a default in the payment of interest or of any installment of principal, or by reason of a failure of the grantor to pay, in accordance with the terms of the mortgage or deed of trust, taxes, assessments, premiums for insurance, or advances made by the mortgagee or beneficiary in accordance with the terms of such obligation or of such mortgage or deed of trust, then the mortgagor or grantor or their successors in interest in the trust property may pay, at any time subsequent to the filing for record of a notice of default and intention to sell and prior to the sale, to the mortgagee or beneficiary or their successor in interest the entire amount then due under the terms of such mortgage or deed of trust, including costs and expenses actually

incurred in enforcing the terms of the obligation and mortgage or deed of trust, and trustee's and attorney's fees other than that portion of the principal which would not then be due had no default occurred, and thereby cure the default theretofore existing.

(2) Thereupon, all proceedings under this chapter theretofore had or instituted shall be dismissed or discontinued, and the obligation and mortgage or deed of trust shall be reinstated and shall be and remain in force and effect, the same as if no acceleration had occurred.

(b) If the default is cured and the mortgage or deed of trust reinstated in the manner provided in this section, the mortgagee, beneficiary, or their successors in interest shall file for record with the recorder of the county in which the trust property is situated a duly acknowledged cancellation of the recorded notice of default and intention to sell under such mortgage or deed of trust.

History. Acts 1987, No. 53, § 14.

CASE NOTES

ANALYSIS

Construction.
Repayment Plan.

Construction.

The right to redeem the property under state law is not the equivalent of curing the default; under Arkansas law, cure requires a lump-sum payment. *In re Gordon*, 161 B.R. 459 (Bankr. E.D. Ark. 1993).

Summary judgment was properly granted in favor of defendant bank which failed to reinstate the mortgage of plaintiff couple; it was undisputed that the couple had failed to pay the entire amount of the past-due payments, late fees, and

costs and expenses, including attorney's fees, before curing the default pursuant to subsection (a) of this section. *Lambert v. Firststar Bank, N.A.*, 83 Ark. App. 259, 127 S.W.3d 523 (2003).

Repayment Plan.

Repayment plan document created no such obligation on the part of the creditors to modify the borrowers' loan; the plan did not alter the fact that the borrowers were not entitled to have the mortgage reinstated until they cured the default by paying past-due payments, late fees, and costs and expenses, including attorney's fees. *Anderson v. CitiMortgage, Inc.*, 2014 Ark. App. 683, 450 S.W.3d 251 (2014).

18-50-115. Implied powers in mortgages.

(a)(1) Subject to the provisions of § 18-50-114 and notwithstanding the terms of the mortgage, a power of sale is implied in every mortgage of real property situated in this state that is duly acknowledged and recorded.

(2) The exercise of the implied power of sale shall be pursuant to the provisions of this chapter.

(b) A mortgagor and his or her successor in interest shall have the rights and duties of a grantor, and a mortgagee and his or her successor in interest shall have the rights and duties of a trustee and a beneficiary.

(c) The mortgagee shall comply with §§ 18-50-103 — 18-50-107, 18-50-109, and 18-50-110 [repealed], and the mortgagee's deed shall comply with § 18-50-111.

History. Acts 1987, No. 53, § 15.

18-50-116. Miscellaneous provisions.

(a) The procedures set forth in this chapter for the foreclosure of a mortgage or deed of trust shall not impair or otherwise affect the right to bring a judicial action to foreclose a mortgage or deed of trust.

(b) A notice of default and intention to sell shall be filed within the time the foreclosure of the mortgage or deed of trust by judicial action could have been commenced.

(c) The procedures set forth in this chapter shall apply only if the mortgagee or beneficiary is a mortgage company as defined in § 18-50-101 or is a bank or savings and loan. This chapter shall not apply to a mortgage or a deed of trust encumbering trust property used primarily for agricultural purposes.

(d) Nothing in this chapter shall be construed to:

(1) Create an implied right of redemption in favor of any person; or

(2)(A) Impair the right of any person or entity to assert his or her legal and equitable rights in a court of competent jurisdiction.

(B) However, a claim or defense of a person or entity asserting his or her or its legal and equitable rights shall be asserted before the sale or it is forever barred and terminated, except that the mortgagor may assert the following against either the mortgagee or trustee:

(i) Fraud; or

(ii) Failure to strictly comply with the provisions of this chapter, including without limitation subsection (c) of this section.

(C)(i) The claims or defenses described in subdivision (d)(2)(B) of this section may not be asserted against a subsequent purchaser for value of the property.

(ii) For purposes of this section, “purchaser for value” does not include the mortgagee or the trustee.

(e)(1) At any time prior to the delivery of the trustee’s or mortgagee’s deed, the trustee or mortgagee shall be authorized to set aside a sale conducted pursuant to this chapter by declaring the sale null and void and returning the purchase price to the highest bidder without any further liability to the bidder.

(2) In this event, the trustee or mortgagee shall file an affidavit declaring the sale null and void with the recorder of the county in which the trust property is located, and all terms and provisions of the mortgage or deed of trust shall be revived and reinstated as if no sale had occurred.

History. Acts 1987, No. 53, § 16; 1989, No. 532, § 4; 1999, No. 983, §§ 11, 12; 2007, No. 721, § 1; 2009, No. 482, § 12.

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U. Ark. Little Rock L. Rev. Annual Survey of Caselaw: Property Law, 27 U. Ark. Little Rock L. Rev. 739.

CASE NOTES

ANALYSIS

Construction.
Claims Barred.
Limits.
Requirements.
Validity of Sale.

Construction.

Statutory framework makes clear that legal or equitable rights must be asserted before a foreclosure sale is held or the claim will be forever barred or terminated, except in cases where fraud or the failure to strictly comply with the applicable statutory provisions can be established. *Brown v. Fed. Home Loan Mortg. Corp.*, 2013 Ark. App. 574, 430 S.W.3d 125 (2013).

Claims Barred.

Summary judgment was properly granted in favor of defendant bank which failed to reinstate the mortgage of plaintiff couple; it was undisputed that the couple had failed to pay the entire amount of the past-due payments, late fees, and costs and expenses, including attorney's fees, before curing the default pursuant to § 18-50-114(a) and the couple failed to sue the bank until after the sale of the property. *Lambert v. Firststar Bank, N.A.*, 83 Ark. App. 259, 127 S.W.3d 523 (2003).

Dismissal of owner's petition to set aside a statutory foreclosure sale of property by the bank was affirmed because an assertion that the land to be foreclosed on was primarily used for agricultural purposes was precisely the kind of claim or defense that must be raised prior to the sale or be forever barred and terminated and the owner did not raise the agricultural-lands defense until well after the auction sale. *Cockrell v. Union Planters Bank*, 359 Ark. 8, 194 S.W.3d 178 (2004).

Company's motion for summary judgment showed it was entitled to possession of the borrowers' property, and it was then up to them to show either fraud or the failure to comply with the applicable requirements, but they failed to do so; because they did not present such proof, their other claims were forever barred. *Brown v. Fed. Home Loan Mortg. Corp.*, 2013 Ark. App. 574, 430 S.W.3d 125 (2013).

Limits.

After the sale, the borrowers were limited by statute to showing either fraud or the failure to comply with the applicable requirements as bases for setting aside the sale, and there was no statutory exception for setting aside a sale based on a legal or equitable claim that there had been a prior modification of the mortgage agreement. *Brown v. Fed. Home Loan Mortg. Corp.*, 2013 Ark. App. 574, 430 S.W.3d 125 (2013).

Requirements.

Only way the borrowers could have successfully set aside the foreclosure sale was to establish either fraud or the failure to strictly comply with the applicable statutory provisions. *Brown v. Fed. Home Loan Mortg. Corp.*, 2013 Ark. App. 574, 430 S.W.3d 125 (2013).

Validity of Sale.

Certain fees associated with the three foreclosures initiated by the creditor were not reasonable and therefore were disallowed. Because the creditor initiated the first foreclosure no later than February 27, 2009, and there was no evidence that it was the mortgagee before May 19, 2009, the first foreclosure would have been invalid under the Arkansas Statutory Foreclosure Act; the charges for the assign-

ment of the mortgage were disallowed, as the assignment was not due to the debtors' default; and the fees charged for posting and cancellation of sale appeared to be exorbitant. In re Burrow, No. 3:09-bk-

18876, 2011 Bankr. LEXIS 1092 (Bankr. E.D. Ark. Mar. 22, 2011).

Cited: *Ellis v. State Farm Bank, F.S.B.*, 2009 Ark. App. 569 (2009).

18-50-117. Foreign corporations and other entities.

No person, firm, company, association, fiduciary, or partnership, either domestic or foreign, shall avail themselves of the procedures under this chapter unless authorized to do business in this state.

History. Acts 2003, No. 1303, § 1.

RESEARCH REFERENCES

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CASE NOTES

ANALYSIS

Authorized to Do Business.
Mortgagees.

Authorized to Do Business.

Entity may be authorized to do business in Arkansas for Arkansas Statutory Foreclosure Act (SFA) purposes pursuant to either state or federal law; in appellee bank's case, National Bank Act provided such authorization, and bank could avail itself of the benefit of the SFA. JPMorgan Chase Bank, N.A. v. Johnson, 719 F.3d 1010 (8th Cir. 2013).

Arkansas Supreme Court would hold registration with state entity was not exclusive means by which an entity may be authorized to do business in Arkansas. JPMorgan Chase Bank, N.A. v. Johnson, 719 F.3d 1010 (8th Cir. 2013).

Because Arkansas Statutory Foreclosure Act contained no express state certification requirements, court had to presume that General Assembly did not intend to include exclusive state registra-

tion it had insisted upon in other statutes. JPMorgan Chase Bank, N.A. v. Johnson, 719 F.3d 1010 (8th Cir. 2013).

Fannie Mae satisfied the "authorized-to-do-business" requirement of this section, where its charter clearly contemplated that it would engage in the business of dealing in mortgages in any state, and such authorization was sufficient to satisfy the requirements of this section. Dickinson v. SunTrust Nat'l Mortg. Inc., 2014 Ark. 513, 451 S.W.3d 576 (2014).

This section does not require an entity to be licensed under Arkansas law. Dickinson v. SunTrust Nat'l Mortg. Inc., 2014 Ark. 513, 451 S.W.3d 576 (2014).

Mortgagees.

National banking association was authorized to avail itself of the Arkansas Statutory Foreclosure Act even though it was not registered with the Arkansas Secretary of State where it was chartered by the Office of the Comptroller of the Currency, and as such, it was authorized to do

business within the state by virtue of this section. JPMorgan Chase Bank, N.A. v. Johnson, 470 B.R. 829 (E.D. Ark. 2012),

aff'd, JPMorgan Chase Bank, N.A. v. Johnson, 719 F.3d 1010 (8th Cir. 2013).

CHAPTERS 51-59

[Reserved]

SUBTITLE 5. CIVIL ACTIONS

CHAPTER 60

MISCELLANEOUS PROCEEDINGS RELATING TO PROPERTY

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. EJECTMENT AND TRESPASS.
3. FORCIBLE ENTRY AND DETAINER — UNLAWFUL DETAINER.
4. PARTITION AND SALE OF LAND.
5. QUIETING TITLE GENERALLY.
6. QUIETING TITLE — PUBLIC SALES.
7. QUIETING TITLE — RAILROADS.
8. RECOVERY OF PERSONAL PROPERTY AND REPLEVIN.
9. VACATING PUBLIC UTILITY EASEMENTS.
10. UNIFORM PARTITION OF HEIRS PROPERTY ACT.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 18-60-101. Right of cotenants to accounting.
- 18-60-102. Injuring, destroying, or carrying away property of another.
- 18-60-103. Liability for damages by fire — Exception.
- 18-60-104. Leaving enclosure open.
- 18-60-105. Improvements erroneously placed on adjoining lands.

SECTION.

- 18-60-106. Sale of lands of infants or individuals with mental illness.
- 18-60-107. Liability for injuries in gathering farm products — Definition.
- 18-60-108. Liability of landowner for injury to trespasser — Definition.

Effective Dates. Acts 1875, p.128, § 7: effective on passage.

Acts 1921, No. 224, § 3: approved Mar. 3, 1921. Emergency clause provided: "This act being necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared, and this act shall take effect and be in full force from and after its passage."

Acts 1937, No. 7, § 2: approved Jan. 26, 1937. Emergency clause provided:

"Whereas thousands of acres of land are now held by bona fide purchasers and donees from the State and are now paying revenue to the State in the form of taxes, and whereas these people are in jeopardy by reason of certain defects in the tax sales under which they purchased, an emergency is hereby declared to exist, and this act shall take effect from and after its passage."

Acts 1937, No. 29, § 2: approved Feb. 4,

1937. Emergency clause provided: "Whereas, it is found that many timber owners are having their property raided by thieves and, Whereas, there is now no proper penalty for the wrongful cutting of timber an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety, it shall take effect and be in full force from and after its passage."

Acts 1957, No. 88, § 3: Feb. 26, 1957. Emergency clause provided: "It has been found and is declared by the General Assembly of the State of Arkansas that the laws of this State do not provide adequate damages for co-owners of land against trespassers who cut, destroy, and carry away timber and other property without the consent of such co-owners, that such co-owners are being deprived of much property each year because of such trespasses, and that the enactment of this Act will provide an adequate penalty against the taking of such property and will discourage such trespasses. Therefore, an emergency is declared to exist, and this Act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

Acts 1993, No. 366, § 5: Mar. 5, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that present law subjects landowners to liability for injuries to trespassers caused by the landowners' gross negligence which is something less than the willful and wanton

misconduct which should cause a defendant in rightful possession of real estate to be liable to a trespasser who is injured. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1993, No. 581, § 5: Mar. 18, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that present law subjects landowners to liability for injuries to trespassers caused by the landowners' gross negligence which is something less than the willful or wanton misconduct which should cause a defendant in rightful possession of real estate to be liable to a trespasser who is injured and that a change in the definition of trespasser as used in that section is urgently needed; that legislation (SB 45) is currently pending which would partially correct this problem but that it is urgent that this section be amended further even if Senate Bill 45 becomes law; that this act is designed to correct all the apparent problems in Arkansas Code 18-60-108 and to supersede the provisions of Senate Bill 45 in the event it becomes law; and that this act is urgently needed to correct the inadequate provisions of 18-60-108 whether or not Senate Bill 45 becomes law, and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

18-60-101. Right of cotenants to accounting.

(a) When any joint tenant, tenant in common, or coparcener in any real estate, or any interest therein, shall take, use, or have the profits and benefits thereof in greater proportion than his or her interest therein, that person, or his or her executor or administrator, shall account therefor to his or her cotenant or cotenants, jointly or severally.

(b) Joint tenants, tenants in common, and coparceners in any real or personal estate may maintain civil actions against their cotenants who receive as bailiffs more than their due proportion of the benefits of the estate.

History. Rev. Stat., ch. 2, §§ 1, 2; C. & M. Dig., §§ 1087, 1088; Pope's Dig., §§ 1300, 1301; A.S.A. 1947, §§ 50-101, 50-102.

Cross References. Feudal tenures prohibited, Ark. Const., Art. 2, § 28.

RESEARCH REFERENCES

Ark. L. Rev. Gitelman, The Impact of the Statute of Gloucester on the Develop-

ment of the American Law of Waste, 39 Ark. L. Rev. 669.

CASE NOTES

ANALYSIS

Applicability.
Common Law Rights.
Improvements.
Withdrawal of Funds.

Applicability.

The right to an accounting under this section does not apply to the tenancy by the entirety of a husband and wife. Neither spouse owns an undivided half interest in any entirety property — the entire entirety estate is vested and held in each spouse. *Wood v. Wright*, 238 Ark. 941, 386 S.W.2d 248 (1965).

A cotenant possesses a right of accounting for revenues (minus expenses) stemming from the exploitation of oil wells. *South Cent. Petro., Inc. v. Long Bros. Oil Co.*, 974 F.2d 1015 (8th Cir. 1992).

Common Law Rights.

While this Code does not define substantive rights among joint tenants, it

recognizes the common law rights of joint tenants, as this section provides for an accounting between them. *Hogan v. Hogan*, 313 Ark. 374, 855 S.W.2d 905 (1993).

Improvements.

Where a tenant in common had received the rents accruing from the land held in common, her subsequent grantee would not be entitled, in a suit for partition, to recover the improvements placed thereon by her in addition to her pro rata share of the land; but will be allowed to offset the rents received by her against the value of the improvements. *Cocke v. Clausen*, 67 Ark. 455, 55 S.W. 846 (1900).

Withdrawal of Funds.

Mere withdrawal of funds by one joint tenant does not establish complete ownership in such joint tenant to the exclusion of any other joint tenants. *Hogan v. Hogan*, 313 Ark. 374, 855 S.W.2d 905 (1993).

Cited: *Dent v. Wright*, 322 Ark. 256, 909 S.W.2d 302 (1995).

18-60-102. Injuring, destroying, or carrying away property of another.

(a) A person trespassing as follows shall pay a person injured treble the value of a thing damaged, broken, destroyed, or carried away, with costs, if the person shall:

(1) Cut down, injure, destroy, or carry away any tree placed or growing for use or shade or any timber, rails, or wood, standing, being, or growing on the land of another person;

(2) Dig up, quarry, or carry away any stone, ground, clay, turf, mold, fruit, or plants; or

(3) Cut down or carry away, any grass, grain, corn, cotton, tobacco, hemp, or flax, in which he or she has no interest or right, standing or being on any land not his or her own, or shall wilfully break the glass, or any part of it, in any building not his or her own.

(b) If any person trespasses upon land in violation of the provisions of this section and if the land is owned by several joint tenants, tenants

in common, coparceners, or other co-owners, then any co-owner who has not given consent to the trespass shall be entitled to treble the value of the thing so damaged, broken, destroyed, or carried away, with costs, the treble damages to be computed according to the amount of the undivided interest of the co-owner.

(c) If on the trial of any action brought under the provisions of this section it shall appear that the defendant had probable cause to believe that the land on which the trespass is alleged to have been committed, or that the thing so taken, carried away, injured, or destroyed, was his or her own, the plaintiff in the action shall recover single damages only, with costs.

History. Rev. Stat., ch. 153, § 4; C. & M. Dig., § 10322; Acts 1937, No. 29, § 1; Pope's Dig., § 1299; Acts 1957, No. 88, § 1; A.S.A. 1947, §§ 50-105, 50-107.

RESEARCH REFERENCES

Ark. L. Notes. Brill, *Arkansas Law of Damages*, Fifth Edition, Chapter 30: Real Property, 2004 *Arkansas L. Notes* 9.

Ark. L. Rev. Agency — Independent Contractor — Liability of Employer for Trespass to Land, 9 *Ark. L. Rev.* 163.

CASE NOTES

ANALYSIS

In General.
Applicability.
Appeals.
Conversion.
Damages.
—Equity.
—Honest Mistake.
—Treble Damages.
Elements of Claim.
Evidence.
Jury Instructions.
Statute of Limitations.
Trespass.

In General.

This section is a re-enactment of Rev. Stat., ch. 153, § 1 [repealed], in haec verba, thereby placing it back in the statutes. *Sturgis v. Nunn*, 203 Ark. 693, 158 S.W.2d 673 (1942).

Applicability.

This section had no application where a tenant in common in possession cut timber on the land without the consent of his cotenants. *Fitzhugh v. Norwood*, 153 Ark. 412, 241 S.W. 8 (1922).

This section providing for treble damages and not § 15-32-301 providing for double damages, would be applicable to a case where trees were injured by a chemi-

cal spray. *McLouth v. General Tel. Co.*, 164 F. Supp. 496 (W.D. Ark. 1958).

This section cannot be applied extra-territorially to an action for damages to land in Oklahoma. *Widmer v. Wood*, 243 Ark. 457, 420 S.W.2d 828 (1967).

Appeals.

Where in an action against the defendants for wrongfully cutting timber from land owned by the plaintiffs, the trial court entered an order holding that the defendants could not be trespassers on the interest of their cotenants (the plaintiffs) and thus that this section did not apply, the court's ruling was not upon a separable branch of the litigation and thus an appeal was not permissible under ARAP 2(a)(2), since there had been no final or otherwise appealable order entered. *Budd v. Davis*, 289 Ark. 373, 711 S.W.2d 478 (1986).

Conversion.

Conversion does not necessarily involve damage to property, which would bring it within the reach of the statute and therefore, the Civil Justice Reform Act of 2003 (CJRA), codified at §§ 16-55-201 — 16-55-220, does not automatically apply to actions under this section; the CJRA clearly evinces an intent to alter the common law regarding joint and several liability for

the causes of action listed, such as personal injury or property damage, but it does not, however, display such an intent regarding causes of action involving the conversion of property, and thus, the trial court did not err in finding the company, owner, and related individual jointly and severally liable with the business and business owner and with each other for the value of the landowner's timber. *Shamlin v. Quadrangle Enters.*, 101 Ark. App. 164, 272 S.W.3d 128 (2008).

Damages.

It was proper for the jury to consider the use which might be and was made of the trees, and if the trees added to the value of the land and their destruction detracted from that value, then the difference in value was the measure of recovery even against one who, without malice, destroyed them; and if the trees were maliciously destroyed, the damages recoverable were treble that value. *Laser v. Jones*, 116 Ark. 206, 172 S.W. 1024 (1915).

If timber has been unlawfully removed from land by a trespasser, the owner has two statutory remedies, for treble damages under this section and for double damages at the stump under § 15-32-301, and also the common law remedy whereby the owner may recover his property after it has been made into lumber or the value thereof. *Peek v. Henderson*, 208 Ark. 238, 185 S.W.2d 704 (1945).

The court was justified in submitting to the jury the issue of whether or not defendant had acted in good faith when he cut timber on plaintiff's land on the evidence when there was question whether he should be subjected to treble damages as a trespasser, double damages as a person who knowingly cut the timber of another, or common law simple damages. *Stair v. Jones*, 223 Ark. 882, 269 S.W.2d 297 (1954).

Where the plaintiffs' lawsuit was for damages to timber and common law trespass, and the plaintiffs also sought punitive damages in connection with the trespass, it amounted to a double punitive recovery for the illegal act; the elements of damages were the same, and such a recovery was prohibited. *Stoner v. Houston*, 265 Ark. 928, 582 S.W.2d 28 (1979).

Substantial evidence held to support award of compensatory damages. *Arnold v. Lee*, 296 Ark. 339, 756 S.W.2d 904 (1988).

Replacement cost of trees destroyed in violation of this section constituted a proper measure of damages. *Revels v. Knighton*, 305 Ark. 109, 805 S.W.2d 649 (1991).

Appellate court affirmed the judgment in favor of plaintiff for defendant's trespass and destruction of marketable timber on plaintiff's land and the award of treble damages as two witnesses testified that a bulldozer was on plaintiff's property at the direction of defendant. *Jackson v. Pitts*, 93 Ark. App. 466, 220 S.W.3d 265 (2005).

Because both punitive damages and treble damages were not awarded against the company, owner, and related individual in the landowner's action under this section, they did not have standing to raise the issue on appeal. *Shamlin v. Quadrangle Enters.*, 101 Ark. App. 164, 272 S.W.3d 128 (2008).

Trial court did not err in denying appellants a new trial or remittitur regarding a punitive damages award in favor of appellees, as the award was not in excess of federal due process standards, given that (1) appellees suffered economic harm, but the harm was much more than purely economic injury, as appellants cut down approximately 40 percent of appellees' future retirement homesite and the privacy afforded by the trees was very important to appellees, (2) appellants' action forced appellees to give up their plans to retire to the property and ultimately sell it, (3) the tree cutting was intentional and not an isolated incident, (4) the profit appellants received from the sale of their property was a direct result of the tree clearing on appellees' property, (5) the award was not so grossly excessive as to have violated federal due process, (6) each of appellants were on notice of and could have been charged with a Class C felony of criminal mischief under § 5-38-203(b)(1) with, under § 5-4-201(a)(2), a potential fine of \$10,000, plus a violation of § 15-32-101(a)(1), (7) was a misdemeanor, with a potential fine and jail time, and (8) under subdivision (a)(1) of this section, appellants had ample notice that their actions could result in a penalty of \$25,000 punitive damages. *Bronakowski v. Lindhurst*, 2009 Ark. App. 513, 324 S.W.3d 719 (2009).

Damages awarded on the property owners' conversion claim were properly set at

the value of the timber taken, which was found to be \$188.95 and then trebled under this section; the only credible evidence as to the value of the timber taken was the testimony of a timber company president estimating the value at \$188.95 since the owners presented only their own opinion as to the value of the trees taken. *Pope v. Overton*, 2011 Ark. 11, 376 S.W.3d 400 (2011).

—Equity.

Neither double nor treble damages are recoverable in equity unless the action was originally brought in law. *Augusta Cooperage Co. v. Bloch*, 153 Ark. 133, 239 S.W. 760 (1922).

Treble damages under this section were not allowable in federal equity court since a forfeiture or penalty will not be enforced in equity. *Williamson v. Chicago Mill & Lumber Corp.*, 59 F.2d 918 (8th Cir. 1932).

By proceeding in equity, rather than at law, plaintiffs waived the consideration of an award of treble damages under this section, as courts of equity will not aid in the enforcement of penalties. *Gardner v. Robinson*, 42 Ark. App. 90, 854 S.W.2d 356 (1993).

—Honest Mistake.

Treble damages were not recoverable from one who in good faith accepted a previous survey as marking the true line, not knowing there was an error in the survey. *Upton v. Wimbrow*, 148 Ark. 408, 230 S.W. 277 (1921).

Where removal of timber from another's land was the result of inadvertence and mistake and not a willful wrong, the landowner could recover only the value of the property when taken. *Augusta Cooperage Co. v. Bloch*, 153 Ark. 133, 239 S.W. 760 (1922); *Sturgis v. Nunn*, 203 Ark. 693, 158 S.W.2d 673 (1942).

Subsection (c) is applicable in mitigation of damages under subsections (a) and (b). *Sturgis v. Nunn*, 203 Ark. 693, 158 S.W.2d 673 (1942).

In action for treble damages under this section on account of cutting pine trees on plaintiff's land, verdict and judgment for single damages only were upheld on the ground that the timber was not knowingly, intentionally or willfully cut from plaintiff's land by defendant. *Case v. Hunt*, 217 Ark. 929, 234 S.W.2d 197 (1950).

Government was not entitled to treble damages for cutting of timber where defendants had presented in evidence a letter from a government department indicating that the timber had been sold to a company which thereafter purportedly sold the timber to defendant. *United States v. Wheeler*, 161 F. Supp. 193 (W.D. Ark. 1958).

Under this section, a good faith argument is a question of fact for the jury. *Arnold v. Lee*, 296 Ark. 339, 756 S.W.2d 904 (1988).

—Treble Damages.

Where defendant, under the authority of a presumed contract, entered the plaintiff's land and cut standing timber and thereafter the presumed contract was repudiated by the plaintiff and the defendant ordered from the land, defendant was responsible to the plaintiff for treble damages for all timber cut after defendant was ordered to leave. *Dickson v. Love*, 149 Ark. 669, 233 S.W. 800 (1921).

Where, shortly after defendant purchased land from rival claimant, plaintiff notified defendant of his title and warned him against trespass, especially the cutting of timber, defendant's cutting of timber thereafter was deliberate and willful, with full knowledge of the consequences should he fail to sustain his claim of title and he was subject to triple damages under this section. *Zunamon v. Brown*, 287 F. Supp. 426 (E.D. Ark. 1968), *aff'd*, 418 F.2d 883 (8th Cir. 1969).

Where two co-defendants cut plaintiff's timber, one at the direction of a third co-defendant, and one on his own, the third co-defendant could not be held liable for treble damages for all the timber so cut, but only that cut by the co-defendant whose actions he had directed. *Russell v. Pryor*, 264 Ark. 45, 568 S.W.2d 918 (1978).

In a proper case, either the jury or the court can treble the damages, but it is preferable for the court to do so. *Arnold v. Lee*, 296 Ark. 339, 756 S.W.2d 904 (1988).

An award of damages, which included restoration costs, was properly trebled under this section. *Shamlin v. Shuffield*, 302 Ark. 164, 787 S.W.2d 687 (1990).

Treble damages were properly awarded where defendant was apprised of neighboring property owner's property line claim before damages were incurred, but proceeded to have his bulldozer operator

cross the line to clear property anyway. *Revels v. Knighton*, 305 Ark. 109, 805 S.W.2d 649 (1991).

In claim for treble damages trial court did not err in precluding plaintiff from recovering treble damages because the two-year limitation period of § 16-56-108 had expired. *Kutait v. O'Roark*, 305 Ark. 538, 809 S.W.2d 371 (1991).

In an action for the wrongful cutting of trees on plaintiffs' property, an award of treble damages would have been inappropriate in the absence of plaintiffs' pleading for them or the issue being tried with the express or implied consent of the parties. *Linebarger v. Owenby*, 79 Ark. App. 61, 83 S.W.3d 435 (2002).

Statutory changes made in 1995 to § 18-11-106, which required one who sought to claim land by adverse possession to show payment of taxes on the property, were found to not be applicable to property owners whose rights to the disputed land had vested prior to that time; thus, where a neighboring property owner was found to have deliberately trespassed onto the land and destroyed a fence, caused ruts in the grass, and drove over a vegetable garden, all in violation of a prior trial court order restricting his right to be on that land, awards of treble damages pursuant to subsection (a) of this section and attorney's fees and costs were proper. *Schrader v. Schrader*, 81 Ark. App. 343, 101 S.W.3d 873 (2003).

Elements of Claim.

The treble-damage remedy under subsection (a) of this section requires a showing of intentional wrongdoing while the double-damage remedy of § 20-22-304 requires something less than intentional misconduct; an effective defense waged in opposition to § 20-22-304 would be markedly different from one mounted against this section. *Hackleton v. Larkan*, 326 Ark. 649, 933 S.W.2d 380 (1996).

Evidence.

In a trespass to timber action, a circuit court did not err in allowing the landowner's expert to testify as to the fair market value of all of the timber removed from the property, including that which was removed prior to the date the land was transferred to a trust, even though the landowner could not recover for timber removed prior to that date, because the

evidence was relevant to prove defendants' wrongful conduct under Ark. R. Evid. 401 for purposes of an award of treble damages under this section, of double damages under § 15-32-301, and of punitive damages. *Travis Lumber Co. v. Deichman*, 2009 Ark. 299, 319 S.W.3d 239 (2009).

Jury Instructions.

Instruction construing section held proper. *Fogel v. Butler*, 96 Ark. 87, 131 S.W. 211 (1910); *Case v. Hunt*, 217 Ark. 929, 234 S.W.2d 197 (1950).

Instruction that jury must find the timber was willfully and intentionally cut and removed and that it was not cut by mistake was not misleading to the jury, since the jury understood that cutting timber by mistake would mean the same thing as cutting with probable cause to believe a party was cutting his own land. *Freeze v. Hinkle*, 229 Ark. 714, 317 S.W.2d 817 (1958).

Where there was jury question as to whether defendant was liable for treble or single damages, it was reversible error to instruct jury that if it found for plaintiff it would award treble damages, even though court had previously quoted section on single damages. *Callaway v. Perdue*, 238 Ark. 652, 385 S.W.2d 4 (1964).

In a trespass and conversion of timber action, the trial court did not err in wording two interrogatories to the jury regarding a timber company's knowledge of a forged timber deed and whether the company removed the timber with probable cause to believe that it owned the timber, because these interrogatories followed the language of § 15-32-301, which authorized double damages if the timber cutting was "knowing," and this section, which provided for single damages only if the timber company had probable cause to believe that the timber was its own. *Travis Lumber Co. v. Deichman*, 2009 Ark. 299, 319 S.W.3d 239 (2009).

Statute of Limitations.

Estate administrator's amended complaint for the wrongful conversion of timber, brought on behalf of the estate, was time-barred under § 16-56-105(4) and (6), the three-year statute of limitations for trespass and conversion, and § 16-56-108, the two-year statute of limitations applicable to penal statutes where the penalty

goes to the person suing, which included claims brought pursuant to this section. It was also barred because the administrator failed to meet the bond requirement of § 28-42-103. *Travis Lumber Co. v. Deichman*, 2009 Ark. 299, 319 S.W.3d 239 (2009).

Trespass.

Where timber purchasers did not know the boundary lines of a tract of land, did not have the land surveyed, and relied on an employee to determine the lines, the evidence warranted a finding that the purchaser committed willful trespass where it was shown that the employee, without the owner's consent, cut trees on the adjoining land. *Lewis v. Mays*, 208 Ark. 382, 186 S.W.2d 178 (1945).

Where the adjacent landowner with a prescriptive easement over the plaintiff landowners' property moved dirt around on the plaintiffs' property in his effort to improve the easement road, thereby changing the topographic structure of the plaintiffs' land, the defendant's actions amounted to a trespass, but it was not the sort of trespass envisioned in this section and treble damages could not be awarded. *Foran v. Molitor Ford*, 279 Ark. 121, 649 S.W.2d 177 (1983).

It was not error for the trial court to have granted summary judgment against an individual in a landowner's action under this section; the case the individual cited had no application to an action like this one because of the nature of the statutory action, which was not the common law action for trespass. *Shamlin v. Quadrangle Enters.*, 101 Ark. App. 164, 272 S.W.3d 128 (2008).

Whether the related individual was an independent contractor or an employee of the company was irrelevant under this section; the company was a sole proprietorship belonging to the owner and had no separate identity apart from the owner, and thus, when the individual, operating on behalf of the company, trespassed on the landowner's property, they were acting as one person and became liable as joint tortfeasors. *Shamlin v. Quadrangle Enters.*, 101 Ark. App. 164, 272 S.W.3d 128 (2008).

Cited: *Pearson v. Ponder*, 225 Ark. 400, 283 S.W.2d 343 (1955); *Callaway v. Perdue*, 238 Ark. 652, 385 S.W.2d 4 (1964); *Zunamon v. Brown*, 418 F.2d 883 (8th Cir. 1969); *McGee v. Wilson*, 275 Ark. 466, 631 S.W.2d 292 (1982); *Lemay v. Baldrige*, 5 Ark. App. 221, 635 S.W.2d 4 (1982).

18-60-103. Liability for damages by fire — Exception.

(a) If any person shall set on fire any grass or other combustible material within his or her enclosures so as to damage any other person, that person shall make satisfaction in single damages to the party injured, to be recovered by civil action in any court having jurisdiction of the amount sued for.

(b) If any person shall, before setting out fire, notify those persons whose farms are joining the place which he or she proposes to burn that he or she is going to fire such grass or other combustible matter and shall use all due caution to prevent such fire from getting out to the injury of any other person, he or she shall not be liable to pay damages as provided in this section.

History. Acts 1875, No. 48, § 5, p. 128; C. & M. Dig., § 10323; Pope's Dig., § 1298; A.S.A. 1947, § 50-104.

Cross References. Reckless burning, penalty, § 5-38-302.

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Ark. L. Rev. Absolute Liability in Arkansas, 8 Ark. L. Rev. 83.

CASE NOTES

ANALYSIS

In General.
Applicability.
Due Care.
Elements of Claim.
Intent.
Location of Property.

In General.

This section was not repealed or superseded by Acts 1935, No. 85 (repealed). *Cecil v. Headley*, 237 Ark. 400, 373 S.W.2d 136 (1963).

Applicability.

This section had no application to the destruction of a warehouse near a railroad right-of-way caused by a fire set by members of a track crew. *Clark v. Kansas City, Ft. S. & M.R.R.*, 129 F. 341 (6th Cir. 1904).

Due Care.

Under this section, due care is a defense only where it concurs with the giving of notice to the adjoining landowner. *Swearengen v. Johns*, 210 Ark. 119, 194 S.W.2d 445 (1946).

Elements of Claim.

The treble-damage remedy under § 18-60-102(a) requires a showing of intentional wrongdoing while the double-damage remedy of § 20-22-304 requires something less than intentional misconduct; an effective defense waged in opposition to § 20-22-304 would be markedly different from one mounted against § 18-

60-102. *Hackleton v. Larkan*, 326 Ark. 649, 933 S.W.2d 380 (1996).

Intent.

This section may be invoked only in the case of intentional firing. *Swearengen v. Johns*, 210 Ark. 119, 194 S.W.2d 445 (1946).

This section imposes absolute liability in cases of intentional firing of farm land except where the required notice is given and due care is exercised to prevent the spread of the fire. *Swearengen v. Johns*, 210 Ark. 119, 194 S.W.2d 445 (1946).

Location of Property.

Subsection (b) does not limit liability to adjoining landowners and it is not necessary that the damaged property abut or have a common boundary line with defendant's property to come within this section. *Cecil v. Headley*, 237 Ark. 400, 373 S.W.2d 136 (1963).

In action for recovery of damages caused by fire started by defendant on his land that spread to plaintiffs' land, the fact that some of the damaged property did not join plaintiffs' property was of no consequence for it is not necessary that the property abut or have a common boundary as there was such a unity of the tracts of land that it could reasonably have been foreseen that such lands would be affected or damaged by fire started by defendant. *Cecil v. Headley*, 237 Ark. 400, 373 S.W.2d 136 (1963).

Cited: *Arkansas Power & Light Co. v. Adcock*, 281 Ark. 104, 661 S.W.2d 392 (1983).

18-60-104. Leaving enclosure open.

If any person shall voluntarily throw down or open any doors, bars, gates, or fences and leave them down or open, other than those that lead into his or her own enclosure, he or she shall pay the party injured the sum of five dollars (\$5.00) for each offense and double the amount of damages the parties may sustain by reason of the doors, bars, gates, or fences being thrown open or down, with costs.

History. Rev. Stat., ch. 153, § 2; C. & M. Dig., § 10321; Pope's Dig., § 5773; A.S.A. 1947, § 50-106.

Publisher's Notes. Rev. Stat., ch. 153, § 3, provided that the penalties contained in this section could be recovered by an

action of trespass or debt (abolished) founded upon the act before a justice of the peace where the damages claimed do not exceed one hundred dollars and in the circuit court if the damages claimed are over one hundred dollars.

18-60-105. Improvements erroneously placed on adjoining lands.

(a) In all cases in which fences, buildings, or other improvements that may be moved have been erroneously placed or erected on lands adjoining land on which the fences, buildings, or other improvements were intended to be erected, the owner of the fences, buildings, or other improvements shall have twelve (12) months' time from the date of the discovery of the erroneous placing of the fences, buildings, or other improvements on the adjoining lands to remove the improvements and place them on his or her own land or premises.

(b) The owner of the fences, buildings, or other improvements so placed erroneously on the adjoining lands shall not be held responsible for any damages to the owner of the adjoining lands on which the fences, buildings, or other improvements were erected by reason of the erroneous erecting or building of the fences, buildings, or other improvements on the adjoining lands.

History. Acts 1921, No. 224, § 2; Pope's Dig., § 5782; A.S.A. 1947, § 50-103.

RESEARCH REFERENCES

Ark. L. Notes. Brill, Equity: Real Property and the Problem of the Troublesome Neighbor, 1994 Ark. L. Notes 1.

CASE NOTES

ANALYSIS

Boundary Lines.
Estoppel.
Removal.

Boundary Lines.

For there to be a valid oral boundary line agreement, four factors must be present: (1) there must be uncertainty or dispute about the boundary line; (2) the agreement must be between the adjoining landowners; (3) the line fixed must be definite and certain; and (4) there must be possession following the agreement. Nunley v. Orsburn, 312 Ark. 147, 847 S.W.2d 702 (1993).

Estoppel.

Grantees without notice of an agreement between their grantors and adjacent landowners as to a boundary line are not estopped to claim land lying beyond a fence called for by the deed. Webb v. Miller, 236 Ark. 245, 365 S.W.2d 450 (1963).

Removal.

Where litigation was pending as to whether building had been placed upon adjoining land, the running of the statutory period for removal of the improvement placed on another's land by mistake was suspended. Dendy v. Greater Damascus Baptist Church, 247 Ark. 6, 444 S.W.2d 71 (1969).

Cited: Hughey v. Bennett, 264 Ark. 64, 568 S.W.2d 46 (1978); Smith v. Stewart, 10 Ark. App. 201, 662 S.W.2d 202 (1983).

18-60-106. Sale of lands of infants or individuals with mental illness.

(a) The sale of land of infants or individuals with mental illness shall not be deemed to be prohibited as being in contravention of the deed, will, or contract under which they hold unless a sale is expressly forbidden by the deed, will, or contract.

(b) When the legal title of land is held by a trustee, he or she shall be a party to the proceedings for its sale. In all other respects the proceedings for the sale of land held in trust for infants and individuals with mental illness shall be the same as when they hold the legal title, except that the trustees shall give bond and security instead of the guardian when the proceeds of sale are to go into the hands of the trustee.

History. Civil Code, § 537; C. & M. §§ 10547, 10548; A.S.A. 1947, §§ 34-Dig., §§ 8125, 8126; Pope's Dig., 1837, 34-1838.

18-60-107. Liability for injuries in gathering farm products — Definition.

(a) No cause of action shall arise against the owner, tenant, or lessee of land or premises for injuries to any person who is on that land or premises for the purpose of gleaning agricultural or farm products, unless that person's injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee.

(b) No cause of action shall arise against the owner, tenant, or lessee of land or premises for injuries to any person, other than an employee or contractor of the owner, tenant, or lessee, who is on the land or premises for the purpose of picking and purchasing agricultural or farm products at a farm or "u-pick" operation, unless the person's injuries were caused by a condition which involved an unreasonable risk of harm and all of the following apply:

(1) The owner, tenant, or lessee knew or had reason to know of the condition or risk;

(2) The owner, tenant, or lessee failed to exercise reasonable care to make the condition safe or to warn the person of the condition or risk; and

(3) The person injured did not know or did not have reason to know of the condition or risk.

(c) As used in this section, "agricultural or farm products" means the natural products of the farm, nursery, grove, orchard, vineyard, garden, and apiary, including, but not limited to, trees and firewood.

History. Acts 1989, No. 101, § 1.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey, Prop-
erty, 12 U. Ark. Little Rock L.J. 659.

18-60-108. Liability of landowner for injury to trespasser —
Definition.

(a)(1) An owner, lessee, or occupant of land does not owe a duty of care to a trespasser on the land and is not liable for any injury to a trespasser on the land.

(2) No cause of action shall arise against the owner, lessee, or occupant of land until the presence of the trespasser on the premises is known, and then the owner, lessee, or occupant of the land shall be liable only for injuries caused by the willful or wanton misconduct of the owner, lessee, or occupant.

(b) This section does not affect the doctrine of attractive nuisance, except that the doctrine may not be the basis for liability of an owner, lessee, or occupant of agricultural land for any injury to a trespasser over the age of eighteen (18).

(c) As used in this section, “trespasser” means a person who enters on the property of another without permission and without an invitation, express or implied.

History. Acts 1991, No. 473, §§ 1-3;
1993, No. 366, § 1; 1993, No. 581, § 1.

SUBCHAPTER 2 — EJECTMENT AND TRESPASS

SECTION.

- 18-60-201. Right of action generally.
- 18-60-202. Actions relating to public lands.
- 18-60-203. Possession claimed under state patents.
- 18-60-204. Parties.
- 18-60-205. Pleadings.
- 18-60-206. Proof required to recover.
- 18-60-207. Judgments.
- 18-60-208. Writ of possession.
- 18-60-209. Recovery of damages.
- 18-60-210. Execution for damages and costs only.

SECTION.

- 18-60-211. Expiration of right to possession pending action.
- 18-60-212. Recovery of lands held under tax title.
- 18-60-213. Recovery for improvements and taxes paid on land of another.
- 18-60-214. Lien of tax deed holder for improvement by reason of survey.

Cross References. Limitation of actions of ejectment, § 18-61-103.

Effective Dates. Acts 1857, p. 80, § 5: effective on passage.

Acts 1945, No. 82, § 4: approved Feb. 21, 1945. Emergency clause provided: “It is hereby ascertained and declared by the 55th General Assembly of the State of

Arkansas that as the law now stands many improvement districts are in danger of losing a large amount of revenue which is justly due them from lands heretofore forfeited to such districts for nonpayment of taxes, and that in many instances such loss of revenue will cause such districts to default in the payment of their bond and

interest requirements; and that to permit a person holding under a tax title from the State to avoid payment of improvement district taxes upon lands purchased from the State by him would result in an unequal distribution of taxation and thus throw more burden of taxation upon those taxpayers who have been paying their taxes; that it is not feasible for improvement districts to keep informed, as to the sale to the State and subsequent possession under a deed from the State, as to all of the lands within the boundaries of said district, and that an emergency, therefore, exists, and this act, being necessary for the immediate preservation of the public

peace, health and safety, shall take effect and be in full force from and after its passage."

Acts 1947, No. 87, § 3: Feb. 18, 1947. Emergency clause provided: "It is ascertained and hereby declared that this act is necessary to avoid confusion in the administration of law and justice by the courts in handling of claims for betterments and improvements made by holders of tax titles, and for the promotion of justice, the immediate preservation of the public peace, health and safety, an emergency is therefore declared and this act shall take effect and be in force from and after its passage and approval."

RESEARCH REFERENCES

Am. Jur. 25 Am. Jur. 2d, Eject., § 1 et seq.

C.J.S. 28A C.J.S., Eject., § 2 et seq.

Ark. L. Notes. Brill, Equity: Real Property and the Problem of the Troublesome Neighbor, 1994 Ark. L. Notes 1.

18-60-201. Right of action generally.

The action of ejectment may be maintained in all cases in which the plaintiff is legally entitled to the possession of the premises.

History. Rev. Stat., ch. 53, § 1; C. & M. Dig., § 3686; Pope's Dig., § 4641; A.S.A. 1947, § 34-1401.

Cross References. Action by state for recovery of possession, § 16-106-105.

RESEARCH REFERENCES

Ark. L. Notes. Brill, Arkansas Law of Damages, Fifth Edition, Chapter 30: Real Property, 2004 Arkansas L. Notes 9.

Ark. L. Rev. Use of the Writ of Assistance in Arkansas, 8 Ark. L. Rev. 92.

CASE NOTES

ANALYSIS

Application.
Election of Remedies.
Railroads.
Title to Support Ejectment.

Application.

In that the very object of an ejectment action under this section was to obtain possession of land from one who wrongfully held possession, a home buyer's malicious-prosecution claim and her abuse of process claim were based on the same

event, the seller's recovery of possession of the house; therefore, the circuit court was correct in holding that the abuse-of-process claim was barred by *res judicata*. *Benedetto v. Justin Wooten Constr., LLC*, 2009 Ark. App. 825, 372 S.W.3d 391 (2009).

Election of Remedies.

Section 16-66-507, which gives an execution purchaser the right of forcible detainer, is not an exclusive remedy so as to prevent an action in ejectment. *Austin v. Huie*, 181 Ark. 412, 26 S.W.2d 87 (1930).

Where a railroad filed an ejectment ac-

tion against respondents, who occupied its right-of-way, 49 U.S.C.S. § 10501(b) did not list ejectment as a matter that was within the jurisdiction of the Surface Transportation Board and the state trial court had subject matter jurisdiction over the ejectment action. *Ouachita R.R., Inc. v. Circuit Court*, 361 Ark. 333, 206 S.W.3d 811 (2005).

Railroads.

Ejectment is remedy where railroad appropriates excessive amount of land. *McKennon v. St. Louis, Iron Mountain & S. Ry.*, 69 Ark. 104, 61 S.W. 383 (1901).

Ejectment is not available to a railroad which wrongfully appropriates land it was entitled to condemn. *McKennon v. St. Louis, Iron Mountain & S. Ry.*, 69 Ark. 104, 61 S.W. 383 (1901).

A railway company may bring ejectment to recover its right of way. *Graham v. St. Louis, Iron Mountain & S. Ry.*, 69 Ark. 569, 65 S.W. 1048 (1901).

Title to Support Ejectment.

A mortgagor or his assignee cannot recover from a mortgagee in possession. *Cohn v. Hoffman*, 45 Ark. 376 (1885).

Open, notorious and adverse possession for seven years gives title which will support ejectment. *Crease v. Lawrence*, 48 Ark. 312, 3 S.W. 196 (1886); *Scott v. Mills*, 49 Ark. 266, 4 S.W. 908 (1887); *Hames v. Harris*, 50 Ark. 68, 6 S.W. 233 (1887); *Nicklace v. Dickerson*, 65 Ark. 422, 46 S.W. 945 (1898).

Proof by plaintiff that his ancestor died in possession of land claiming under color

of title makes prima facie case. *Weaver v. Rush*, 62 Ark. 51, 34 S.W. 256 (1896).

The plaintiff cannot recover where he shows prima facie title in another. *Dickinson v. Thornton*, 65 Ark. 610, 47 S.W. 857 (1898).

An equitable title will not support ejectment. *McCord v. Welch*, 105 Ark. 119, 150 S.W. 566 (1912).

An equitable title coupled with a legal right to possession is sufficient to support ejectment. *Faulkner v. Feazel*, 113 Ark. 289, 168 S.W. 568 (1914).

In a suit in ejectment in which the record did not show that the plaintiffs or their grantors were ever in actual possession of the land in question, the plaintiffs must depend for recovery upon the strength of their record title and not upon the weakness of the defendant's title. *Bunch v. Johnson*, 138 Ark. 396, 211 S.W. 551 (1919).

Action of ejectment may be brought where there is a legal right to possession against one who wrongfully holds possession. *Henry v. Gulf Ref. Co.*, 176 Ark. 133, 2 S.W.2d 687 (1927).

Trial court did not err in dismissing appellants' ejectment claim under this section because the claim could not stand in conjunction with the trial court's determination that appellees had a valid quiet title. *Davis v. Gillam*, 2011 Ark. App. 744 (2011).

Cited: *Ritchie v. Johnson*, 50 Ark. 551, 8 S.W. 942 (1888); *Brasher v. Taylor*, 109 Ark. 281, 159 S.W. 1120 (1913); *Dorey v. McCoy*, 246 Ark. 1244, 442 S.W.2d 202 (1969).

18-60-202. Actions relating to public lands.

(a) The action of ejectment may be maintained in all cases in which the plaintiff claims the possession of the premises under or by virtue of:

(1) An entry made with the register and receiver of the proper land office of the United States;

(2) A preemption right under the laws of the United States; or

(3) When an improvement has been made by him or her on any of the public lands of the United States, whether the lands have been surveyed or not, and when any person, other than those to whom the right of action is given by subdivisions (a)(1) and (2) of this section, is in possession of the improvement.

(b) An action of trespass may also be maintained in all the cases enumerated in subsection (a) of this section.

(c) The executor or administrator of any person who has died and who in his or her lifetime made improvements on any of the public lands

of the United States, whether he or she had a right of preemption to the improvements or not under the laws of the United States, or whether the lands on which the improvements may have been made have been surveyed or not, may maintain an action of ejectment for the recovery of the improvement, to the same extent and with the same restrictions as provided by subsection (a) of this section, for their testator or intestate.

History. Rev. Stat., ch. 53, §§ 2, 3, 19; Dig., §§ 4642, 4643, 4657; A.S.A. 1947, C. & M. Dig., §§ 3687, 3688, 3702; Pope's §§ 34-1402, 34-1403, 34-1429.

CASE NOTES

ANALYSIS

Burden of Proof.
Jurisdiction.
Title.

Burden of Proof.

The plaintiff in ejectment has the burden where each party claims under a deed of the state land commissioner. *Winn v. Whitehouse*, 96 Ark. 42, 131 S.W. 70 (1910).

Jurisdiction.

The circuit court had jurisdiction of an ejectment suit where it appeared that the defendant had entered the land in controversy before being sued and obtained a patent after judgment was rendered against him in the circuit court, since there was no controversy between the two claimants to the land before the United States Department of the Interior relieving the circuit court of its jurisdiction. *Jimmerson v. Fordyce Lumber Co.*, 106 Ark. 127, 152 S.W. 1022 (1913).

Title.

Ejectment may be maintained on any certificate of entry. *Trulock v. Taylor*, 26 Ark. 54 (1870); *Surginer v. Paddock*, 31 Ark. 528 (1876); *Gaither v. Lawson*, 31 Ark. 279 (1876); *Brummett v. Pearle*, 36 Ark. 471 (1880); *Steward v. Scott*, 57 Ark. 153, 20 S.W. 1088 (1893); *Jimmerson v. Fordyce Lumber Co.*, 119 Ark. 413, 178 S.W. 381 (1915); *Abraham v. Hatchett*, 128 Ark. 15, 193 S.W. 72 (1917).

Possession is prima facie evidence of title. *Jacks v. Dyer*, 31 Ark. 334 (1876); *Ferguson v. Peden*, 33 Ark. 150 (1878).

A void patent may be used to give color of title. *Logan v. Jelks*, 34 Ark. 547 (1879).

A void certificate of homestead entry constitutes color of title. *Abraham v. Hatchett*, 128 Ark. 15, 193 S.W. 72 (1917).

Cited: *Newsome v. Williams*, 27 Ark. 632 (1872); *Trapnall v. Hill*, 31 Ark. 345 (1876); *Wells v. Rice*, 34 Ark. 346 (1879); *Queen of Arkansas Ins. Co. v. Taylor*, 100 Ark. 9, 138 S.W. 990 (1911).

18-60-203. Possession claimed under state patents.

(a) The action of ejectment may be maintained in all cases when the plaintiff claims the possession of the premises under or by virtue of an entry made with the proper swampland agent or land agent of the proper land office of the State of Arkansas.

(b) The patent certificates granted by any of the named officers shall be evidence of title in the party to whom it is granted.

History. Acts 1857, § 1, p. 170; C. & M. Dig., § 3690; Pope's Dig., § 4645; A.S.A. 1947, § 34-1405.

CASE NOTES

ANALYSIS

Purchasers.
Title.

Purchasers.

Purchaser under certificate from the state may protect his rights by action of ejectment. *Sorrels v. Warnock*, 116 Ark. 496, 173 S.W. 417 (1915).

Title.

Where the state sold swamp land and issued a certificate of purchase therefor to the purchaser, before a patent was issued to the state, the certificate passed the state's equitable title to the purchaser and the state, upon issuance of the patent, became a naked trustee of the legal title. *Hibben v. Malone*, 85 Ark. 584, 109 S.W. 1008 (1908).

18-60-204. Parties.

(a) The action of ejectment shall be brought and prosecuted in the real names of the parties thereunto.

(b) The action may be brought against the person in possession of the premises claimed or his or her lessor, or both.

(c) The person from or through whom the defendant claims title to the premises may, on his or her motion, be made a codefendant.

History. Rev. Stat., ch. 53, §§ 4, 5; C. & M. Dig., §§ 3683-3685; Pope's Dig., §§ 4638-4640; A.S.A. 1947, §§ 34-1406, 34-1407.

CASE NOTES

ANALYSIS

Conclusiveness of Judgment.
Legal Representatives.
Necessary Parties.

Conclusiveness of Judgment.

Where the parties to the action were the real parties in interest, and where the lands claimed have to be accurately described, a verdict and judgment is as final and conclusive as in a personal action. *Sturdy v. Jackaway*, 71 U.S. (4 Wall.) 174, 18 L. Ed. 387 (1866).

Legal Representatives.

In an action by mortgagee, representatives of deceased mortgagor need not be

made parties. *Simms v. Richardson & May*, 32 Ark. 304 (1877).

Necessary Parties.

An action may be brought by the administrator to recover possession, but nothing will be settled beyond the right of possession, and, if the title is put in issue, the heirs must be made parties. *Chowning v. Stanfield*, 49 Ark. 87, 4 S.W. 276 (1886).

Cited: *Nicklace v. Dickerson*, 65 Ark. 422, 46 S.W. 945 (1898).

18-60-205. Pleadings.

(a)(1) In all actions for the recovery of lands, except in actions of forcible entry and unlawful detainer, the plaintiff shall set forth in his or her complaint all deeds and other written evidences of title on which he or she relies for the maintenance of his or her suit.

(2) The plaintiff shall file copies of the evidences as far as they can be obtained, as exhibits therewith, and shall state such facts as shall show a prima facie title in himself or herself to the land in controversy.

(b) The defendant in his or her answer shall plead in the same manner as required from the plaintiff. The defendant in his or her answer shall set forth exceptions to any of the documentary evidence relied on by the plaintiff to which he or she may wish to object, and the exceptions shall specifically note the objections taken.

(c) The plaintiff shall in the same manner, within three (3) days after the filing of the answer, unless longer time is given by the court, file like exceptions to any documentary evidence exhibited by the defendant.

(d) All the exceptions shall be passed on by the court and shall be sustained or overruled, as the law may require. If any exception is sustained to any of the evidence, it shall not be used at the trial unless the defect for which the exception is taken shall be covered by amendment.

(e) All objections to the evidence not specifically pointed out in the manner provided in this section shall be waived.

History. Acts 1875, No. 104, §§ 1-3, p. 229; C. & M. Dig., §§ 3691-3693; Pope's Dig., §§ 4646-4648; A.S.A. 1947, §§ 34-1408 — 34-1410.

CASE NOTES

ANALYSIS

Answer.
Complaint.
Defenses.
Evidence of Title.
Exceptions.
Exhibits.
Variance.

Answer.

Answer held insufficient. *Wilson v. Murray*, 188 Ark. 312, 66 S.W.2d 622 (1933).

Procedure to be pursued by defendant in ejectment is by an answer and not by a motion to dismiss. *Lincoln Nat'l Life Ins. Co. v. Smith*, 205 Ark. 1023, 172 S.W.2d 241 (1943).

Complaint.

Complaint in ejectment held sufficient. *Driver v. Board of Dirs.*, 70 Ark. 358, 68 S.W. 26 (1899).

When the plaintiff in an ejectment suit bases his right of recovery wholly upon the invalidity of the tax sale under which the defendant claims and alleges such invalidity in his complaint, the allegations continue to be a part of the pleadings after the answer is filed and the complaint will be held to be a substantial compliance with this section. *Wolf & Bailey v. Phillips*, 107 Ark. 374, 155 S.W. 924 (1913).

Where the plaintiffs' complaint in an action in ejectment did not set out how or

by what right they claim possession of the land in controversy, the complaint would be held bad. *McAlister v. Harness*, 110 Ark. 293, 161 S.W. 185 (1913).

Where plaintiff in suit for ejectment claimed title to property by virtue of proceedings in bankruptcy against former owner but bankruptcy orders attached to complaint did not describe property, complaint was defective. *Jones v. Harris*, 221 Ark. 716, 255 S.W.2d 691 (1953).

An ejectment complaint which shows by reference to attached conveyances title in plaintiff's family over a period of years with nothing on file showing title to the disputed tract in defendants will be construed as pleading prior peaceful possession in plaintiff and as sufficient to force defendants to plead. *Wyatt v. Griffin*, 242 Ark. 562, 414 S.W.2d 377 (1967).

Complaint insufficient to show proper title. *Scott v. Rutherford*, 243 Ark. 306, 419 S.W.2d 595 (1967).

Because of statutory requirement, in an ejectment action, the rule that any specificity or other defect should be reached, at least in equity, by a motion to make the complaint definite and certain is not applicable. *McKim v. McLiney*, 250 Ark. 423, 465 S.W.2d 911 (1971).

Defenses.

An equitable title coupled with the right to the legal title is a good defense in

ejectment. *Alexander v. Hardin*, 54 Ark. 480, 16 S.W. 264 (1891).

The defendant in an action of ejectment to recover land may take advantage of the fraud of the plaintiff and his grantor by answer and cross-complaint and have the action transferred to the equity docket. *Neal v. Wideman*, 59 Ark. 5, 26 S.W. 16 (1894).

A defendant in ejectment having no title or right to possession of the land in controversy is not in a position to invoke the doctrine of estoppel or laches nor to question the bona fides of the plaintiff who holds under a perfect record title. *Cooper v. Newton*, 68 Ark. 150, 56 S.W. 867 (1900); *Davis v. Beauchamp*, 99 Ark. 404, 138 S.W. 636 (1911).

Where, in ejectment, the defendant set up that the plaintiff's title was procured by fraud and asked that the cause be transferred to equity and the cloud on the defendant's title removed, it was error to refuse to make the transfer. *Castle v. Hillman*, 70 Ark. 157, 66 S.W. 648 (1902).

Equitable defenses may be interposed. *Gates v. Gray*, 85 Ark. 25, 106 S.W. 947 (1907).

Equitable title is not a good defense if the legal right to possession is wanting. *Stricklin v. Moore*, 98 Ark. 30, 135 S.W. 360 (1911); *Fort Smith Whse. Co. v. Friedman-Howell & Co.*, 111 Ark. 15, 163 S.W. 175 (1914).

This section requires the defendant in an ejectment action to affirmatively plead the defense of adverse possession. *Mid-South Partitions, Inc. v. Brandon*, 261 Ark. 317, 547 S.W.2d 764 (1977).

Evidence of Title.

A plat is not evidence of title. *Pace v. Crandall*, 74 Ark. 417, 86 S.W. 812 (1905).

As the burden of proving title in himself is undertaken by one who sues in ejectment, the defendant may rely upon the weakness of the plaintiff's title. *Dowdle v. Wheeler*, 76 Ark. 529, 89 S.W. 1002 (1905).

Where the plaintiffs in an ejectment suit relied upon a deed executed by the Commissioner of State Lands and the defendant relied upon a prior deed executed by the Commissioner there is a statutory presumption in favor of each deed and the plaintiffs, to succeed, must

show that they have the real title. *Winn v. Whitehouse*, 96 Ark. 42, 131 S.W. 70 (1910).

Where the answer in an action in ejectment admitted that the defendant derived his title through a mortgage from the plaintiffs' ancestor and other mesne conveyances, proof by the plaintiffs that they were the sole heirs of the deceased made a prima facie case in their favor and the burden was on the defendant to show that the ancestor had conveyed the land away or that his heirs were barred by the statute of limitations. *Foster v. Elledge*, 106 Ark. 342, 153 S.W. 819 (1913).

Exceptions.

The exceptions and the rulings of the court on them are parts of the record. *Jacks v. Chaffin*, 34 Ark. 534 (1879).

A copy of an addition to a town is neither a deed nor a written evidence of title and is not a subject of exception. *Pace v. Crandall*, 74 Ark. 417, 86 S.W. 812 (1905).

Exceptions need not be passed upon before trial. *Winn v. Eickhoff*, 139 Ark. 211, 213 S.W. 405 (1919).

Exhibits.

The exhibits need not be copied in the pleadings; only the substance need be stated. *Surginer v. Paddock*, 31 Ark. 528 (1876).

The exhibits are parts of record, though not of the pleadings. *Percifull v. Platt*, 36 Ark. 456 (1880).

Variance.

Where the plaintiffs sued in ejectment, alleging title based on a mining claim, a different cause of action and source of title based on adverse possession could not be introduced by them after the issue was joined and the cause was before the jury. *White River Mining & Nav. Co. v. Langston*, 76 Ark. 420, 88 S.W. 971 (1905).

Where a complaint in ejectment alleges title in the plaintiff's grantor by adverse possession, proof tending to show title by deed in such grantor is variant. *Westmoreland v. Plant*, 89 Ark. 147, 116 S.W. 188 (1909).

Cited: *Dacus Lumber Co. v. Dickey*, 252 Ark. 480, 479 S.W.2d 849 (1972).

18-60-206. Proof required to recover.

(a) To entitle the plaintiff to recover, it shall be sufficient for him or her to show that, at the time of the commencement of the action, the defendant was in possession of the premises claimed and that the plaintiff had title thereto or had the right to the possession thereof as is declared by §§ 18-60-201 and 18-60-202 to be sufficient to maintain the action of ejectment.

(b) If the action is brought by a joint tenant or tenant in common against his or her cotenant, the plaintiff shall also be required to show at the trial that the defendant actually ousted him or her or did some act amounting to a total denial of his or her right as a cotenant.

History. Rev. Stat., ch. 53, §§ 11, 12; C. §§ 4649, 4650; A.S.A. 1947, §§ 34-1411, & M. Dig., §§ 3694, 3695; Pope's Dig., 34-1412.

CASE NOTES**ANALYSIS**

Conveyances.

Cotenants.

Right to Possession.

Title.

Conveyances.

Plaintiff need not prove conveyances not put in issue. *Horseman v. Hinch*, 138 Ark. 415, 211 S.W. 385 (1919).

Cotenants.

Where cotenant is ousted, his remedy is by ejectment. *London v. Overby*, 40 Ark. 155 (1882); *LaCotts v. Pike*, 91 Ark. 26, 120 S.W. 144 (1909); *Long v. Long*, 104 Ark. 562, 149 S.W. 662 (1912).

Right to Possession.

One seeking to recover in ejectment, relying upon the fact that her ancestor died in possession without color of title, must show actual possession in such ancestor. *Nicklance v. Dickerson*, 65 Ark. 422, 46 S.W. 945 (1898).

One who holds the better legal right to possession is entitled to recover in eject-

ment. *Henry v. Gulf Ref. Co.*, 176 Ark. 133, 2 S.W.2d 687 (1927).

In an ejectment action, where the plaintiff establishes he is the holder of the record title, the burden is on the defendant to establish his claim of adverse possession. *Howell v. Baskins*, 213 Ark. 665, 212 S.W.2d 353 (1948).

Title.

Plaintiff must succeed upon strength of his own title. *Apel v. Kelsey*, 47 Ark. 413, 2 S.W. 102 (1886); *Nicklance v. Dickerson*, 65 Ark. 422, 46 S.W. 945 (1898); *Carpenter v. Jones*, 76 Ark. 163, 88 S.W. 871 (1905); *Wilson & Beall v. Gaylord*, 77 Ark. 477, 92 S.W. 26 (1906); *Ward v. Sturdivant*, 81 Ark. 73, 98 S.W. 690 (1906); *Allen v. Phillips*, 87 Ark. 185, 112 S.W. 403 (1908); *Winn v. Campbell*, 94 Ark. 338, 126 S.W. 1059 (1910); *Wolf & Bailey v. Phillips*, 107 Ark. 374, 155 S.W. 924 (1913); *Bunch v. Johnson*, 138 Ark. 396, 211 S.W. 551 (1919).

Cited: *Brasher v. Taylor*, 109 Ark. 281, 159 S.W. 1120 (1913); *Hayden v. Hill*, 128 Ark. 342, 194 S.W. 19 (1917); *Dodson v. Abercrombie*, 218 Ark. 50, 234 S.W.2d 30 (1950).

18-60-207. Judgments.

(a) In all cases in which no other provision is made, the judgment, if for the plaintiff, shall be for the recovery of the possession of the premises and the damages and costs.

(b) If judgment should be rendered against the defendant, the judgment shall be for the recovery of the premises, and a writ of inquiry shall be awarded to assess the damages.

History. Rev. Stat., ch. 53, §§ 15, 18; C. §§ 4653, 4656; A.S.A. 1947, §§ 34-1416, & M. Dig., §§ 3698, 3701; Pope's Dig., 34-1417.

CASE NOTES

ANALYSIS

Damages.
Enforcement.
Statute of Limitations.

Damages.

Where the jury assesses no damages, the court cannot do so. *Cannon v. Davies*, 33 Ark. 56 (1878).

Enforcement.

Where judgment is recovered against mere clerk of tenant in possession, it will be enjoined. *Stewart v. Pace & Lavender*, 30 Ark. 594 (1875).

After judgment in ejectment, a person found in possession will be presumed to hold under the defendant, and the writ of possession will oust him, and if he holds by an independent title, it is incumbent on him to show it. *Ritchie v. Johnson*, 50 Ark. 551, 8 S.W. 942 (1888).

Statute of Limitations.

When part of the plaintiffs are precluded from recovery only by the statute of limitations, the others not barred are entitled to judgment for their proportional part of the land and damages. *Wheeler v. Ladd*, 40 Ark. 108 (1882).

18-60-208. Writ of possession.

When the judgment for the plaintiff is both for the recovery of the possession of the premises and for the damages, the plaintiff may have a writ of possession. The writ shall command the officer to whom it may be directed to deliver to the plaintiff possession of the premises and also command him or her to levy and collect the damages and costs, as in executions on judgments in personal actions.

History. Rev. Stat., ch. 53, § 16; C. & M. Dig., § 3699; Pope's Dig., § 4654; A.S.A. 1947, § 34-1418.

18-60-209. Recovery of damages.

(a) If the plaintiff prevails in the action, he or she shall recover by way of damages the rents and profits down to the time of assessing them.

(b) When the plaintiff or those under whom he or she claims title may have entered in any land office of the United States within this state the improvement of the defendant and the action is brought to recover the possession of the improvement the plaintiff shall recover no damages.

History. Rev. Stat., ch. 53, § 13; C. & M. Dig., § 3696; Pope's Dig., § 4651; A.S.A. 1947, § 34-1413.

CASE NOTES

ANALYSIS

Amount of Award.
Profits.
Rents.

Amount of Award.

Award of damages held excessive. *Graham v. St. Louis, Iron Mountain & S. Ry.*, 69 Ark. 569, 65 S.W. 1048 (1901).

Profits.

The plaintiff is entitled to mesne profits if he recovers the land. *Jacks v. Dyer*, 31 Ark. 334 (1876).

Rents.

Measure of damages for wrongful holding of possession was the reasonable rental value of the premises. *Fort Smith Whse. Co. v. Friedman-Howell & Co.*, 111 Ark. 15, 163 S.W. 175 (1914).

Statutes awarding rent by way of damages in ejectment cases do not refer to mortgagees obtaining possession under condition broken, but refer to owners against adverse claimants. *Williams v. Baker*, 207 Ark. 731, 182 S.W.2d 753 (1944).

18-60-210. Execution for damages and costs only.

When the judgment for the plaintiff is only for damages and costs, execution may be issued thereon as on judgments in personal actions.

History. Rev. Stat., ch. 53, § 17; C. & M. Dig., § 3700; Pope's Dig., § 4655; A.S.A. 1947, § 34-1415.

18-60-211. Expiration of right to possession pending action.

If the right of the plaintiff to the possession of the premises expires after the commencement of the action and before the trial, the verdict shall be returned according to the facts and judgment shall be entered only for the damages and costs.

History. Rev. Stat., ch. 53, § 14; C. & M. Dig., § 3697; Pope's Dig., § 4652; A.S.A. 1947, § 34-1414.

18-60-212. Recovery of lands held under tax title.

(a) No action for the recovery of any lands or for the possession thereof against any person, or his or her heirs or assigns, who may hold such lands by virtue of a purchase thereof at a sale by the collector or Commissioner of State Lands, for the nonpayment of taxes, or who may have purchased them from the state by virtue of any act providing for the sale of lands forfeited to the state or the nonpayment of taxes, or who may hold the land under a donation deed from the state, shall be maintained unless it appears that the plaintiff, his or her ancestors, predecessors, or grantors were seized or possessed of the lands in question within two (2) years next before the commencement of the action.

(b) This section shall not apply to lands which have been sold to any improvement district of any kind or character for taxes due the districts

nor to any taxes due any improvement districts, but the lien of the taxes shall continue until paid.

(c) The person, or his or her heirs or assigns, claiming any land mentioned in subsection (a) of this section shall, before the issuing of any writ, file in the office of the clerk of the proper court an affidavit setting forth that the claimant has tendered to the purchaser or purchasers thereof, or his or her agent or legal representative, the full amount of all taxes and costs first paid on account of the lands, with interest thereon at the rate of one hundred percent (100%) upon the amount first paid for the lands and twenty-five percent (25%) upon all costs and taxes paid upon the land thereafter, from the time the costs and taxes were paid, and also the full value of all improvements of whatever kind and description made on the lands, by the purchaser or purchasers, his or her heirs or assigns, or tenants, and that it has been refused.

(d) If any action shall be brought in any court of record in this state against any purchaser, or his or her heirs or assigns, holding any lands as specified in subsection (a) of this section, and it shall appear to the satisfaction of the court that no affidavit, as required in subsection (c) of this section, was filed previous to the commencement thereof, it shall be the duty of the court to dismiss the action at the cost of the plaintiff.

(e) If judgment shall be given against any purchaser, or his or her heirs or assigns who hold any lands as provided for in subsection (a) of this section in favor of any person claiming them, no matter by what manner of title, the judgment shall only be for the possession of the premises in question, and damages shall be assessed in favor of the defendant for the full amount of all taxes, costs, and interest provided for in subsection (c) of this section, together with the full value of all improvements of whatever kind and description made thereon, for which judgment shall be entered in favor of the defendant, and it shall be a lien upon the lands until satisfied.

History. Acts 1857, §§ 1-4, p. 80; C. & M. Dig., §§ 3708-3710, 6947; Pope's Dig., §§ 4663-4665, 8925; Acts 1945, No. 82, § 2; A.S.A. 1947, §§ 34-1419 — 34-1422.

A.C.R.C. Notes. As enacted, Acts 1857, § 2, p. 80, in part, required that the affidavit set forth a tender by the claimant to the purchaser of the full amount of all taxes and costs first paid on account of the lands, with interest on them "at the rate of one hundred percentum upon the amount first paid for said lands and twenty-five percentum upon all costs and taxes paid upon said land thereafter." The interest provisions of Acts 1857, § 2, p. 80, may have been superseded by Acts 1883, No. 114, § 139, as amended by Acts 1893, No.

34, § 1 and 1967, No. 502, § 1, which provided for the redemption of land sold for taxes and for the payment of ten percent (10%) annual interest on the taxes for which the land was first sold, the penalties and costs thereon and the taxes which the purchaser subsequently paid on the land. Acts 1883, No. 114, § 139, as amended, was superseded by §§ 26-37-101 — 26-37-105, 26-37-201 — 26-37-205 and 26-37-301 — 26-37-303.

Publisher's Notes. Acts 1857, § 1, p. 80, as amended, is also codified as § 18-61-106.

Cross References. Right of compensation for improvements, § 26-37-209.

RESEARCH REFERENCES

Ark. L. Rev. Bills to Remove Cloud on Title and Quieting Title, 6 Ark. L. Rev. 83.
Memorandum Relative to Certain Aspects of Tax Title, 6 Ark. L. Rev. 167.

A Commentary on State and Improvement District Tax Sales, 8 Ark. L. Rev. 386.

CASE NOTES

ANALYSIS

Constitutionality.

In General.

Construction.

Applicability.

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Donation Deeds or Certificates.

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—Void Deed or Sale.

—Color of Title.

Constitutionality.

Subsection (d) is not unconstitutional. *Craig v. Flanagan*, 21 Ark. 319 (1860); *Coats v. Hill*, 41 Ark. 149 (1883).

Subsection (a) is valid. *Ross v. Royal*, 77 Ark. 324, 91 S.W. 178 (1905).

In General.

Purchasers in good faith of land sold for taxes are protected. *Jones v. Fowler*, 171 Ark. 594, 285 S.W. 363 (1926).

Construction.

This section must be strictly construed. *Reynolds v. Plants*, 196 Ark. 116, 116 S.W.2d 350 (1938); *McMillen v. East Ark. Inv. Co.*, 196 Ark. 367, 117 S.W.2d 724 (1938).

Applicability.

This section only applies to an action for the recovery of possession, not to a suit to foreclose a mortgage. *Wright v. Walker*, 30 Ark. 44 (1875); *Gates v. Kelsey*, 57 Ark. 523, 22 S.W. 162 (1893); *City of Helena v. Hornor*, 58 Ark. 151, 23 S.W. 966 (1893); *Willingham v. Jordan*, 75 Ark. 266, 87

S.W. 424 (1905); *Carpenter v. Smith*, 76 Ark. 447, 88 S.W. 976 (1905); *Dickinson v. Hardie*, 79 Ark. 364, 96 S.W. 355 (1906); *Bradbury v. Dumond*, 80 Ark. 82, 96 S.W. 390 (1906); *Gannon v. Moore*, 83 Ark. 196, 104 S.W. 139 (1907); *Tatum v. Arkansas Lumber Co.*, 103 Ark. 251, 146 S.W. 135 (1912); *Terry v. Drainage Dist. No. 6, Miller County*, 206 Ark. 940, 178 S.W.2d 857 (1943).

This section has no application to a case where public lands have been sold for taxes, and they have been afterward entered. *Gaither v. Lawson*, 31 Ark. 279 (1876).

This section does not apply to a suit to enjoin the execution of a tax deed. *Hare v. Carnall*, 39 Ark. 196 (1882).

This section applies to infants and others under disability. *Sims v. Camby*, 53 Ark. 418, 14 S.W. 623 (1890); *Sparks v. Farris*, 71 Ark. 117, 71 S.W. 255 (1903).

This section did not apply in a case where the widow who was joint tenant with minor children in homestead suffered a forfeiture for nonpayment of taxes as a device to destroy the interests of the minor children. *Rowland v. Wadly*, 71 Ark. 273, 72 S.W. 994 (1903).

This section does not apply to a sale of land belonging to the state. *Brinneman v. Scholem*, 95 Ark. 65, 128 S.W. 584 (1910).

This section applies to possession under a donation certificate. *Jones v. Fowler*, 171 Ark. 594, 285 S.W. 363 (1926).

This section has no application where the alleged purchaser has no color of title. *Sutton v. Lee*, 181 Ark. 914, 28 S.W.2d 697 (1930).

This section is not applicable in cases other than those for the recovery of lands or the possession thereof. *Reynolds v. Plants*, 196 Ark. 116, 116 S.W.2d 350 (1938).

This section was not applicable in favor of defendant who purchased land sold for taxes under erroneous double assessment and who had title to and possession for

statutory period of adjacent tract under deed from taxpayer's father. *Morgan v. Austin*, 206 Ark. 235, 174 S.W.2d 562 (1943).

Subsections (c) and (d) do not apply when the tax sale is void for lack of power or authority to sell the land or a description in the tax deeds sufficient to identify the property. Before subsections (c) and (d) apply, there must be a prayer for possession by the person who has filed the quiet title action; that, in essence, makes it an ejectment action. *Liggett v. Church of Nazarene*, 291 Ark. 298, 724 S.W.2d 170 (1987).

Pursuant to the terms of the patent, and by operation of 43 U.S.C.S. § 869-2, disputed property that was subject to a 1965 patent issued by the United States to the State of Arkansas reverted back to the United States after Arkansas lost its claim to the property by failing to timely challenge several tax deeds issued for the property, as required by this section. The disputed property could not end up in private hands because it was public land that had been conveyed to a governmental body for public use, i.e. for fish and wildlife management, which meant something more substantial than private hunting and fishing excursions. *Flannigan v. Arkansas*, 427 F. Supp. 2d 861 (E.D. Ark. 2006).

Actions for Recovery of Land.

Action by heirs of deceased owner to cancel a deed from the state based on tax sale was not an action for the recovery of lands within the provision of this section. *Reynolds v. Plants*, 196 Ark. 116, 116 S.W.2d 350 (1938).

Suit to recover on notes for balance on purchase price of land, to have a lien declared and to foreclose, was held not an action for the recovery of land within this section. *Rural Realty Co. v. Buckner*, 203 Ark. 474, 158 S.W.2d 17 (1942).

Intervention in suit by the state to confirm a state's title to lands for the purpose of invalidating the tax sale and canceling the deed is not a possessory action within this section. *Farrell v. Sanders*, 204 Ark. 1068, 166 S.W.2d 889 (1942).

Affidavits.

A bill for the redemption of lands sold for taxes, or ejectment therefor, may be dismissed if the affidavit is not first filed.

Craig v. Flanagan, 21 Ark. 319 (1860); *Pope v. Macon*, 23 Ark. 644 (1861); *Spain v. Johnson*, 31 Ark. 314 (1876).

The failure to file an affidavit of the tender of the taxes and interest and of the value of the improvements made is a good defense to an action of ejectment and may be presented either by motion or by plea in abatement. *Craig v. Flanagan*, 21 Ark. 319 (1860); *Pope v. Macon*, 23 Ark. 644 (1861); *Haney v. Cole*, 28 Ark. 299 (1873); *Spain v. Johnson*, 31 Ark. 314 (1876); *Wycough v. Ford & Reed*, 35 Ark. 500 (1880).

The failure to file an affidavit is waived where no objections are made. *Pettus & Glenn v. Wallace*, 29 Ark. 476 (1874); *Spain v. Johnson*, 31 Ark. 314 (1876); *Sugg v. Utley*, 186 Ark. 560, 54 S.W.2d 413 (1932).

The affidavit is unnecessary where the taxes were paid before the sale. *Wagner v. Head*, 94 Ark. 490, 127 S.W. 706 (1910).

Affidavit held in sufficient compliance with this section. *Wolf & Bailey v. Phillips*, 116 Ark. 115, 172 S.W. 894 (1915).

Where neither the notice of a tax sale of land nor the tax deed described the land sold for taxes with sufficient particularity to identify it, the owner could maintain an action to recover such land from the purchasers without complying with subsection (c). *Buchanan v. Pemberton*, 143 Ark. 92, 220 S.W. 660 (1920).

Where complaint alleges that plaintiff is the owner and is entitled to the possession thereof, the action is for the recovery of the lands and affidavit of tender is required regardless of omission of prayer to ask for possession. *Chronister v. Skidmore*, 198 Ark. 261, 129 S.W.2d 608 (1939).

Allegations of complaint that quorum court was not legally in session did not avoid the necessity of the affidavit of tender of taxes and betterments since there is no claim that land was not subject to taxation or that the taxes were paid. *Chronister v. Skidmore*, 198 Ark. 261, 129 S.W.2d 608 (1939).

Where a tax sale is absolutely void for lack of power to sell, the affidavit of tender required by this section is dispensed with; where the tax sale is voidable for mere irregularities of the officers conducting the sale, the rule is different. *Smart v. Alexander*, 201 Ark. 211, 144 S.W.2d 25 (1940).

An intervention in state's suit to confirm tax title to lands to invalidate the tax sale and to cancel the state's deed to the defendant was not a possessory action within this section, therefore intervenor was not required to file the affidavits required by this section. *Farrell v. Sanders*, 204 Ark. 1068, 166 S.W.2d 889 (1942).

Affidavit held not required where tax purchaser not in possession of land. *Robinette v. Day*, 210 Ark. 181, 194 S.W.2d 878 (1946).

Plaintiff in ejectment suit who failed to file required affidavit was entitled on motion to take a nonsuit without prejudice. *Brown v. Frazier*, 223 Ark. 671, 267 S.W.2d 951 (1954).

Donation Deeds or Certificates.

One possessed of donation certificate merely cannot invoke this statute. *Woodruff v. Dickinson*, 199 Ark. 663, 135 S.W.2d 667 (1940).

Donation deed to holder of land under donation certificate conveyed such title as the state had when the deed was issued and grantee's possession related back to the certificate in so far as rights under this section are conferred. *Terry v. Drainage Dist. No. 6, Miller County*, 206 Ark. 940, 178 S.W.2d 857 (1943).

Holder of donation certificate who occupied land adversely for more than statutory period acquired good title notwithstanding the fact that drainage district was holder of record title. *Honeycutt v. Sherrill*, 207 Ark. 206, 179 S.W.2d 693 (1944).

Improvement Districts.

This section does not afford relief against suit to foreclose prior drainage district tax liens. *Miller v. Cache River Drainage Dist.*, 205 Ark. 618, 170 S.W.2d 371 (1943).

Payment of Taxes.

Possessor's failure to pay subsequent taxes does not operate to deprive him of the benefit of this section nor to question validity of subsequent tax sale. *Schuman v. Kerby*, 203 Ark. 653, 158 S.W.2d 35 (1942); *Sage Land & Lumber Co. v. Hickey*, 222 Ark. 147, 257 S.W.2d 941 (1953).

A widow having what is similar to a life estate in the homestead has the duty to pay the taxes, and cannot remain in possession and acquire a tax title adverse to

the remainderman. *Vesper v. Woolsey*, 231 Ark. 782, 332 S.W.2d 602 (1960).

Pleading.

Objection may be made either by motion or by answer. *Pope v. Macon*, 23 Ark. 644 (1861).

An allegation in a complaint that the defendant has been in lawful possession of the land for statutory period is not an admission that the possession was adverse or under claim of ownership under a tax deed and therefore does not show affirmatively that the plaintiff's right of action is barred. *Berg v. Johnson*, 139 Ark. 243, 213 S.W. 393 (1919).

Complaint held sufficient. *Smart v. Alexander*, 201 Ark. 211, 144 S.W.2d 25 (1940).

Nonpossessory suit in equity to cancel alleged void tax sale and donation certificate could not, after decree granting the relief prayed, be converted into an action in ejectment by thereafter filing a motion for a writ of assistance and still be maintained in equity, thus depriving defendant of all rights to have compensation for his improvements made. *Patterson v. McKay*, 202 Ark. 241, 150 S.W.2d 196 (1941).

Possession.

Actual possession of the plaintiff, his ancestors, predecessors, or grantors under a deed is contemplated. *Harvey v. Douglass*, 73 Ark. 221, 83 S.W. 946 (1904); *Towson v. Denson*, 74 Ark. 302, 86 S.W. 661 (1905).

Under this section, actual possession of land taken and held continuously for statutory period under a tax deed bars an action for recovery though the sale is irregular or void for jurisdictional defects. *Maywood v. Mayo*, 153 Ark. 620, 241 S.W. 7 (1922).

Continuous possession for statutory period is necessary to sustain title under this section. *Pride v. Gist*, 169 Ark. 1096, 277 S.W. 870 (1925).

Actual possession during the statutory period of time must be continuous and unbroken. *McMillen v. East Ark. Inv. Co.*, 196 Ark. 367, 117 S.W.2d 724 (1938).

Where complaint to set aside tax deed was not filed until more than two years after date of deed and grantee had held possession of the lot for longer than the statutory period under his tax deed, the deed would not be set aside. *Bridwell v.*

Davis, 206 Ark. 445, 175 S.W.2d 992 (1943).

Actual possession of land under deed from the state for over four years before former owner intervened in suit to confirm state title alleging invalidity of tax sale to the state vested a good title as against any claim of ownership by former owner. *Standard Sec. Co. v. Republic Mining & Mfg. Co.*, 207 Ark. 335, 180 S.W.2d 575 (1944).

Where minerals were constructively severed from the soil by mineral deeds, and were non-producing, it follows that there was no possession of the minerals by anyone within the purview of this section. *Davis v. Stonecipher*, 218 Ark. 962, 239 S.W.2d 756 (1951).

In action to quiet title by purchaser at tax sale wherein defendant counter-claimed for cancellation of tax deed, this statute of limitations could have only been invoked by one in actual possession of the land. *Alsobrook v. Taylor*, 254 Ark. 132, 491 S.W.2d 808 (1973).

Limited warranty deeds to the farm, although invalid because of the constitutionally insufficient notice to the railroad, still constituted color of title for purposes of the two-year limitations period in subsection (a) of this section, color of title alone was not sufficient to set in motion the statute of limitations; a purchaser with color of title also had to take possession, and no claim was made that the farm opened and operated a mine on the lands or drilled for and produced oil or gas. Therefore, the two-year statute of limitations in this section did not run against the railroad. *Linn Farms Timber Ltd. P'ship v. Union Pac. R.R.*, No. 4:09CV00663 JLH, 2010 U.S. Dist. LEXIS 51714 (E.D. Ark. May 25, 2010), *aff'd*, 661 F.3d 354 (8th Cir. 2011).

—Adverse Possession.

Adverse possession for statutory period by tax purchaser bars original owner. *Cooper v. Lee*, 59 Ark. 460, 27 S.W. 970 (1894); *Woolfork v. Buckner*, 60 Ark. 163, 29 S.W. 372 (1895); *Finley v. Hogan*, 60 Ark. 499, 30 S.W. 1045 (1895).

Adverse possession for statutory period by tax purchaser bars original owner, unless there is a right to redeem. *McConnell v. Swepston*, 66 Ark. 141, 49 S.W. 566 (1899).

A purchaser at a void tax sale who goes into possession and remains in undis-

turbed possession for longer than the statutory period acquires title by adverse possession. *Black v. Brown*, 129 Ark. 270, 195 S.W. 673 (1917).

Actual adverse possession of land taken and held continuously for statutory period under a donation deed bars an action for recovery, even though sale by a collector, through which the state claims title, is void on account of jurisdictional defects. *Terry v. Drainage Dist. No. 6*, *Miller County*, 206 Ark. 940, 178 S.W.2d 857 (1943).

This section is a statute of limitations and actual adverse possession under a tax deed from the Commissioner of State Lands vests a good title in the occupying holder of the donation certificate or deed, regardless of any defects in the tax sale under which the state acquired title. *Honeycutt v. Sherrill*, 207 Ark. 206, 179 S.W.2d 693 (1944).

After purchaser held land adversely under donation for two years, his title became good by limitation and would not be divested out of him because he attempted to purchase from the holder of the record title. *Honeycutt v. Sherrill*, 207 Ark. 206, 179 S.W.2d 693 (1944).

Where state's deed to mortgagor's son was in effect a redemption by mortgagor, possession of land by son was not adverse under this section. *Lewis v. Fidelity Sav. & Trust Co.*, 207 Ark. 433, 181 S.W.2d 22 (1944).

Title by adverse possession acquired. *St. Louis Union Trust Co. v. Hillis*, 207 Ark. 811, 182 S.W.2d 882 (1944).

The fact that purchaser and his grantor, who took possession of land under the deed from the State of Arkansas, held exclusive possession of lands and exercised visible and notorious acts of ownership over same, for longer than the statutory period prior to the filing of an action by the plaintiff, was sufficient to give the purchaser title. *Pitts v. Johnson*, 212 Ark. 119, 205 S.W.2d 449 (1947).

One who took title under a void tax sale, and claimed adverse possession for more than the statutory period, was entitled to only the land which he had actually possessed. *Nall v. Phillips*, 213 Ark. 92, 210 S.W.2d 806 (1948).

Intent to hold land adversely was not disclaimed where plaintiffs made offer to buy out defendant, if offer stated that plaintiffs were claiming title under tax

deed, and were merely offering what it would take to clear title. *Cook v. Langhorne*, 219 Ark. 443, 242 S.W.2d 838 (1951).

Tax title purchaser could not assert adverse possession as a result of the original owner's tenant having attorned to the tax title purchaser after tax sale in absence of proof that original owner had notice that tenant had attorned to such purchaser or was put on notice that the statute of limitations was running. *Laney v. Monsanto Chem. Co.*, 233 Ark. 645, 348 S.W.2d 826 (1961).

Where testimony showed no plaintiff had ever been in possession of land in question, this section applied and one holding under a state deed adversely for the statutory time had vested title regardless of a defect in the tax sale. *Brown v. Masterson*, 240 Ark. 880, 402 S.W.2d 666 (1966).

Where the record contained no evidence of notice of any kind to the heirs or their predecessor in title, the defendant's claim to title which rested wholly on a showing of adverse possession following possession by permission would fail. *McDowell v. King*, 266 Ark. 1005, 589 S.W.2d 594 (Ct. App. 1979).

This section, in essence, shortens the period of limitation for the recovery of lands adversely possessed under deeds based on tax sales to two years, and two years actual adverse possession by the holder of the tax deed is required before the original owner's right to recover the land is barred. *Boyd v. Meador*, 10 Ark. App. 5, 660 S.W.2d 943 (1983).

Redemption.

A suit by an infant to redeem land sold is not controlled by this section. *Burgett v. McCray*, 61 Ark. 456, 33 S.W. 639 (1896); *Hodges v. Harkleroad*, 74 Ark. 343, 85 S.W. 779 (1905); *Chambers v. Burke*, 194 Ark. 665, 109 S.W.2d 117 (1937).

Plea of limitations was not available to attorney to whom some co-tenants had mortgaged land to secure fee, since his purchase at tax sale of all land was in effect a redemption for the benefit of all co-tenants. *Kitchens v. Wheeler*, 200 Ark. 671, 141 S.W.2d 34 (1940).

Conveyance of title based upon tax sale to administratrix of the person who owned the lot at the time of the sale operated as a redemption from the sale, the tax title

merged into the legal title and her grantees had no tax title which could enable them to claim under the provisions of this section against heirs of the taxpayer. *Hofstatter v. Bona*, 205 Ark. 729, 170 S.W.2d 1016 (1943).

The fact that this section has no saving clause in favor of infants does not preclude a minor from bringing an action to redeem a homestead from forfeiture after the limitations period as the action is saved by §§ 16-56-116 and 26-37-305. *Kendrick v. Bowden*, 211 Ark. 196, 199 S.W.2d 740 (1947).

Since the tax title acquired by a widow amounted to a redemption, the statute of limitations on tax sales had no application, nor could a claim of adverse possession for the statutory period be anchored on the tax title. *Vesper v. Woolsey*, 231 Ark. 782, 332 S.W.2d 602 (1960).

Running of Statute.

The statute of limitations begins to run from the expiration of the period allowed for redemption, not from the date of sale. *Cairo & F.R.R. v. Parks*, 32 Ark. 131 (1877).

Actual possession under deed sets the statute of limitations in motion. *Woolfolk v. Buckner*, 67 Ark. 411, 55 S.W. 168 (1900); *Hixon v. Fulks*, 210 Ark. 204, 194 S.W.2d 870 (1946).

Time is reckoned from date of deed. *Wade v. Goza*, 78 Ark. 7, 96 S.W. 388 (1906); *Hixon v. Fulks*, 210 Ark. 204, 194 S.W.2d 870 (1946).

Statute of limitations held not to bar action to recover land. *Hurst v. Munson*, 152 Ark. 313, 238 S.W. 42 (1922).

Possession by virtue of a purchase at a void tax sale must have been extended or enlarged after the date of the collector's deed before this statute of limitations will begin to run. *Sanderson v. Thomas*, 192 Ark. 302, 90 S.W.2d 965 (1936).

Action held barred by statute of limitations. *Chavis v. Henry*, 205 Ark. 163, 168 S.W.2d 610 (1943); *Bridwell v. Davis*, 206 Ark. 445, 175 S.W.2d 992 (1943); *Baum v. Yarberry*, 212 Ark. 471, 206 S.W.2d 190 (1947).

This section is a statute of limitations, and begins to run, not from the date of sale, but from the date actual possession is taken under the deed. *Terry v. Drainage Dist. No. 6, Miller County*, 206 Ark. 940, 178 S.W.2d 857 (1943); *Sims v. Petree*, 206

Ark. 1023, 178 S.W.2d 1016 (1944); Hoch v. Ratliff, 216 Ark. 357, 226 S.W.2d 39 (1950).

In order for tax title purchaser to assert adverse possession as a result of original owner's tenant having attorned to tax title purchaser after tax sale, the true owner must be put on notice that the two year statute is running in favor of tax title grantee. Laney v. Monsanto Chem. Co., 233 Ark. 645, 348 S.W.2d 826 (1961).

The only way the statute of limitations of this section will run against the owner of mineral rights is for the owner of the surface rights or some other person to take actual possession of the minerals by opening mines and operating them. Walker v. Western Gas Co., 5 Ark. App. 226, 635 S.W.2d 1 (1982).

Period of limitation begins to run, not from the date of the tax deed, but from the date actual possession is taken under it. Boyd v. Meador, 10 Ark. App. 5, 660 S.W.2d 943 (1983).

—Donation.

Possession under donation certificate does not set the statute of limitations in motion. Hagerman v. Moon, 68 Ark. 279, 57 S.W. 935 (1900); Quertermous v. Walls, 70 Ark. 326, 67 S.W. 1014 (1902).

The statute of limitations against an action to recover forfeited lands held under a donation deed does not begin to run until the possession of the defendants begins under the donation deed. Dressler v. Carpenter, 107 Ark. 353, 155 S.W. 108 (1913).

The statute of limitations begins to run from the defendant's holding under a donation deed, not from the date of the collector's sale of the land for nonpayment of taxes. Hutton v. Pease, 190 Ark. 815, 81 S.W.2d 21 (1935).

Tender of Taxes, Etc.

That land was sold to a tenant of the owner does not go to the power to sell so as to avoid the necessity of a tender. Chronister v. Skidmore, 198 Ark. 261, 129 S.W.2d 608 (1939).

Requirement as to tender of taxes was not applicable to a suit to quiet title. Duncan v. Board of Dirs., 206 Ark. 1130, 178 S.W.2d 660 (1944).

Validity of Deed or Sale.

A purchaser of land who has been in possession of the land under a tax deed for

more than the statutory period acquires title regardless of the validity of the tax sale. Black v. Brown, 129 Ark. 270, 195 S.W. 673 (1917); Maywood v. Mayo, 153 Ark. 620, 241 S.W. 7 (1922); Pitts v. Johnson, 212 Ark. 119, 205 S.W.2d 449 (1947); Baum v. Yarberry, 212 Ark. 471, 206 S.W.2d 190 (1947); Hoch v. Ratliff, 216 Ark. 357, 226 S.W.2d 39 (1950); Dowd v. Elliott, 220 Ark. 228, 247 S.W.2d 208 (1952).

This section is a statute of limitations, which when applicable concludes all inquiry into the validity of a tax sale where the property sold was sufficiently described. Schuman v. Kerby, 203 Ark. 653, 158 S.W.2d 35 (1942); Hofstatter v. Bona, 205 Ark. 729, 170 S.W.2d 1016 (1943).

Contest of validity of the tax sale is subject to the statute of limitations on action for recovery of land against purchaser at sale by the Commissioner of State Lands. Jaedecke v. Rummell, 207 Ark. 286, 180 S.W.2d 842 (1944).

A tax deed description is sufficient if the description itself furnishes the key through which the land might be definitely located by proof aliunde. Liggett v. Church of Nazarene, 291 Ark. 298, 724 S.W.2d 170 (1987).

—Void Deed or Sale.

This section applies to sales which are invalid because of irregularities and omissions of the officers making them, but does not extend to sales void for the want of power. Kelso v. Robertson, 51 Ark. 397, 11 S.W. 582 (1888); Winn v. City of Little Rock, 165 Ark. 11, 262 S.W. 988 (1924); Sutton v. Lee, 181 Ark. 914, 28 S.W.2d 697 (1930).

One who takes possession of a part of a tract of unoccupied land under a tax deed conveying the entire tract acquired title to the entire tract by limitation after the lapse of the statutory period even though the sale under which the deed was made was void. Earl v. Harris, 121 Ark. 621, 182 S.W. 273 (1915).

The statute of limitations applicable to possession under a tax deed applies to any tax deed which sufficiently describes the land occupied and purports to convey the same, even though the deed is void on its face. Champion v. Williams, 165 Ark. 328, 264 S.W. 972 (1924).

One whose title depends on a void tax deed may, regardless of the invalidity of

the sale and the tax purchaser's lack of belief in his title, recover the taxes and value of improvements as a condition upon which a writ of possession will issue. *Reynolds v. Plants*, 196 Ark. 116, 116 S.W.2d 350 (1938); *Farrell v. Sanders*, 204 Ark. 1068, 166 S.W.2d 889 (1942).

Where tax sale was void because notice did not contain sufficient description, but deed of the Commissioner of State Lands correctly described a portion of the land sold under the void description and there was possession under the donation certificate and deed of more than the statutory period, the donee was protected by this section. *Wilson v. Triplett*, 204 Ark. 902, 165 S.W.2d 943 (1942).

Tax deed covering sale of mineral interests in certain described land was void where mineral interests in assessment book were indexed alphabetically instead of by land description. *Davis v. Stonecipher*, 218 Ark. 962, 239 S.W.2d 756 (1951).

This section is applicable to possession under a tax deed which sufficiently describes the land even though such deed is void for other reasons. *Sage Land & Lumber Co. v. Hickey*, 222 Ark. 147, 257 S.W.2d 941 (1953).

The section runs against void sales as well as voidable or regular sales. *Sage Land & Lumber Co. v. Hickey*, 222 Ark. 147, 257 S.W.2d 941 (1953).

— —Color of Title.

Void tax deed is not color of title. *Woodall v. Edwards*, 83 Ark. 334, 104 S.W. 128 (1907).

Deeds to land by the state, though based on void sales, constitute color of title, and actual possession under color of title will bar the owner from maintaining a suit for its recovery unless the suit was brought within statutory time limit. *Brandon v. Parker*, 124 Ark. 379, 187 S.W. 312 (1916).

A tax deed void for insufficient description is not such color of title as will set in motion the statute of limitations. *Halliburton v. Brinkley*, 135 Ark. 592, 204 S.W. 213 (1918); *Kennedy v. Burns*, 140 Ark. 367, 215 S.W. 618 (1919); *Goodrich v. Darr*, 161 Ark. 514, 256 S.W. 868 (1923); *Liggett v. Church of Nazarene*, 291 Ark. 298, 724 S.W.2d 170 (1987).

The invalidity of a tax sale does not prevent the tax deed from being color of title in order to apply the statute of limitations. *Skelly Oil Co. v. Johnson*, 209 Ark. 1107, 194 S.W.2d 425 (1946).

Cited: *McCann v. Smith*, 65 Ark. 305, 45 S.W. 1057 (1898); *Witherspoon v. Johnson*, 201 Ark. 100, 144 S.W.2d 39 (1940); *Townsend v. Bonner*, 205 Ark. 172, 169 S.W.2d 125 (1943); *Schuman v. Westbrook*, 207 Ark. 495, 181 S.W.2d 470 (1944); *Hensley v. Phillips*, 215 Ark. 543, 221 S.W.2d 412 (1949); *Beck v. DeFir*, 227 Ark. 112, 296 S.W.2d 396 (1956); *National Property Owners Ass'n v. Hogue*, 229 Ark. 743, 318 S.W.2d 151 (1958).

18-60-213. Recovery for improvements and taxes paid on land of another.

(a) If any person believing himself or herself to be the owner, either in law or equity, under color of title has peaceably improved, or shall peaceably improve, any land which upon judicial investigation shall be decided to belong to another, the value of the improvement made as stated and the amount of all taxes which may have been paid on the land by the person, and those under whom he or she claims, shall be paid by the successful party to the occupant, or the person under whom, or from whom, he or she entered and holds, before the court rendering judgment in the proceedings shall cause possession to be delivered to the successful party.

(b)(1) The court or jury trying the cause shall assess the value of the improvements in the same action in which the title to the lands is adjudicated.

(2) On the trial, the damages sustained by the owner of the lands from waste and any mesne profits as may be allowed by law shall also be assessed.

(c)(1) If the value of the improvements made by the occupant and the taxes paid as stated in subsection (a) of this section shall exceed the amount of the damages and mesne profits combined, the court shall enter an order as a part of the final judgment providing that no writ shall issue for the possession of the lands in favor of the successful party until payment has been made to the occupant of the balance due him or her for the improvements and the taxes paid.

(2) This amount shall be a lien on the lands, which may be enforced by equitable proceedings at any time within three (3) years after the date of the judgment.

(d) In recoveries against the occupants, no account for any mesne profits shall be allowed unless they shall have accrued within three (3) years prior to the commencement of the suit in which they may be claimed.

(e) In any of these equitable proceedings, the court may allow to the owner of the lands, as a setoff against the value of the improvements and taxes, the value of all rents accruing after the date of the judgment in which it has been allowed.

History. Acts 1883, No. 69, §§ 1-4, p. 106; C. & M. Dig., §§ 3703-3706; Pope's Dig., §§ 4658-4661; A.S.A. 1947, §§ 34-1423 — 34-1426.

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CASE NOTES

ANALYSIS

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Constitutionality.

This section is constitutional and retrospective. *Fee v. Cowdry*, 45 *Ark.* 410 (1885); *Beard v. Dansby*, 48 *Ark.* 183, 2 *S.W.* 701 (1886).

In General.

One making improvements upon the land of another in good faith and under color of title is entitled to recover the value thereof. *Nunn v. Lynch*, 89 *Ark.* 41, 115 *S.W.* 926 (1908); *Davis v. Davis*, 93 *Ark.* 93, 124 *S.W.* 525 (1910); *Green v. Maddox*, 97 *Ark.* 397, 134 *S.W.* 931 (1911); *Wilkins v. Maggard*, 190 *Ark.* 532, 79

S.W.2d 1003 (1935); *Riddle v. Williams*, 204 Ark. 1047, 166 S.W.2d 893 (1942).

Construction.

This section should be strictly construed as penal in nature and may not be invoked by one in possession under a donation certificate merely. *Beloate v. State ex rel. Att'y Gen.*, 187 Ark. 17, 58 S.W.2d 423 (1933).

Applicability.

This section is not applicable to the state's land. *Martin v. Roesch*, 57 Ark. 474, 21 S.W. 881 (1893).

This section cannot be invoked by one who was never in possession. *St. Louis, Iron Mountain & S. Ry. v. Blaylock*, 121 Ark. 402, 181 S.W. 302 (1915).

This section does not apply to public agencies. *City of Little Rock v. Jeuryens*, 133 Ark. 126, 202 S.W. 45 (1918).

This section applies to tenants in common. *Wallis v. McGuire*, 234 Ark. 491, 352 S.W.2d 940 (1962).

This section applies to tenants in common involved in ejectment and trespass actions, and does not apply to tenants in common involved with a partition suit which is governed by § 18-60-401. *Graham v. Inlow*, 302 Ark. 414, 790 S.W.2d 428 (1990).

This section requires one entitled to recover for improvements to meet two tests: (1) he must believe himself to be the owner of the property; and (2) he must hold under color of title. *Tolson v. Dunn*, 48 Ark. App. 219, 893 S.W.2d 354 (1995).

This section applies in cases where a party, believing himself to be the owner of land and under color of title, peacefully improves land later discovered to belong to another; this section was not applicable where plaintiffs made improvements to land that they purchased under an installment contract. *Hudson v. Hilo*, 88 Ark. App. 317, 198 S.W.3d 569 (2004).

Amount of Recovery.

Improvements are to be measured by the increased value of the land and not by their cost. *Greer v. Fontaine*, 71 Ark. 605, 77 S.W. 56 (1903).

One making improvements on lands of another may recover interest thereon from the time the improvements were made. *McDonald v. Kenney*, 101 Ark. 9, 140 S.W. 999 (1911).

The proper criterion for determining the amount to which a tenant in common was entitled for his improvements was not their cost or present value but the amount by which the improvements had enhanced the land's value. *Wallis v. McGuire*, 234 Ark. 491, 352 S.W.2d 940 (1962); *Smith v. Nelson*, 240 Ark. 954, 403 S.W.2d 99 (1966).

Where the owners of a fraction of a parcel of land bought the entire tract at a partition sale, they were entitled to the full value of the improvements they had made in the entire tract prior to the sale, out of the proceeds of the sale, subject to adjustment on income and taxes. *Crouch v. Crouch*, 251 Ark. 1047, 476 S.W.2d 248 (1972).

Appeals.

Successful party who took possession of the land before paying the defendant for his improvements was not entitled to appeal after accepting the benefits of the judgment. *Wolford v. Warfield*, 170 Ark. 82, 278 S.W. 639 (1926).

Color of Title.

The defendant must hold under color of title, peaceably, and in good faith. *Kemp v. Cossart*, 47 Ark. 62, 14 S.W. 465 (1885); *Teaver v. Akin*, 47 Ark. 528, 1 S.W. 772 (1886); *Edrington v. Jefferson*, 53 Ark. 545, 14 S.W. 99 (1890).

An instrument having grantor and grantee, a description of the land, and apt words of conveyance, gives color of title. *Beard v. Dansby*, 48 Ark. 183, 2 S.W. 701 (1886).

One cannot recover for improvements made before color of title was acquired. *Anderson v. Williams*, 59 Ark. 144, 26 S.W. 818 (1894).

A bond for title is not color of title. *White v. Stokes*, 67 Ark. 184, 53 S.W. 1060 (1899); *Beasley v. Equitable Sec. Co.*, 72 Ark. 601, 84 S.W. 224 (1904).

An invalid will may be color of title. *Bloom v. Strauss*, 70 Ark. 483, 69 S.W. 549, 69 S.W. 548 (1902).

One who by mistake erects improvements upon the land of an adjacent proprietor, having no color of title thereto, cannot claim such improvements. *Foltz v. Alford*, 102 Ark. 191, 143 S.W. 905 (1912).

A quitclaim deed is color of title. *Holub v. Titus*, 120 Ark. 620, 180 S.W. 218 (1915).

A certificate of purchase is not color of title. *Johnson v. Taylor*, 140 Ark. 100, 215 S.W. 162 (1919).

One making improvements upon land of another cannot, without color of title to the disputed land, claim under this section. *Wallace v. Snow*, 197 Ark. 632, 124 S.W.2d 209 (1939).

Life estate did not confer color of title. *Graves v. Bean*, 200 Ark. 863, 141 S.W.2d 50 (1940); *Perry v. Rye*, 223 Ark. 594, 267 S.W.2d 507 (1954).

A donation certificate for land forfeited to the state for taxes is not color of title entitling one in possession under it to recover for improvements. *Rodgers v. Massey*, 204 Ark. 225, 161 S.W.2d 378 (1942).

Repurchase from the state amounted to redemption and therefore subsequent improvements were not made under color of title. *Dedmon v. Hawkins*, 211 Ark. 840, 203 S.W.2d 183 (1947).

Deed from holder of void tax deed, neither party knowing of defects until improvements were made, constituted color of title within the meaning of this section. *Deniston v. Langsford*, 216 Ark. 875, 228 S.W.2d 42 (1950).

Purchaser of heir's interest was not entitled to betterments for improvements in partition proceeding filed by other heirs where he made improvements prior to purchase of interest. *Welch v. Burton*, 221 Ark. 173, 252 S.W.2d 411 (1952).

No color of title was shown where claimant produced no instrument in writing purporting to convey any interest in the property and payments to the record titleholder, while claimed to have been payments on purchase price, were less than the reasonable rental value of the property. *Baker v. Ellis*, 245 Ark. 484, 432 S.W.2d 871 (1968).

Where homebuilders did not make the improvements under color of title, they were not entitled to damages under this section. *Tolson v. Dunn*, 48 Ark. App. 219, 893 S.W.2d 354 (1995).

Evidence.

Evidence sufficient to support award for the improvements made on land. *Weatherly v. Purcell*, 217 Ark. 908, 234 S.W.2d 32 (1950); *Hutchison v. Sheppard*, 226 Ark. 508, 290 S.W.2d 843 (1956).

Evidence insufficient to support award for improvements. *Hutchison v. Sheppard*, 225 Ark. 14, 279 S.W.2d 33 (1955).

In partition action by co-tenants it was not error to exclude evidence of the cost of

improvements which the tenant in common made while in possession of land, and for which he sought to be reimbursed. *Wallis v. McGuire*, 234 Ark. 491, 352 S.W.2d 940 (1962).

Where, although in partition action by co-tenants improvements made by tenant in common were considered, the only matter decided by reviewing court was the question of notice to co-tenants of adverse claim of tenant in possession, the adverse claimant, following remand, was entitled to offer additional testimony relative to improvements and rent. *Wallis v. McGuire*, 234 Ark. 491, 352 S.W.2d 940 (1962).

Where no proof of enhanced value of the land appears in the record, compensation cannot be awarded for improvements made by one tenant in common while in possession of the land. *Wallis v. McGuire*, 234 Ark. 491, 352 S.W.2d 940 (1962).

Where plaintiffs testified that they considered third party to be the owner of property to which they allegedly made improvements, and the contract under which plaintiffs were in possession did not purport to convey title until after plaintiffs fully performed the contract, plaintiffs were not entitled to damages for the alleged improvements. *Smith v. MRCC Partnership*, 302 Ark. 547, 792 S.W.2d 301 (1990).

Finality of Decree.

A decree which adjudged the title to land to be in the plaintiff without awarding the value of improvements made by the defendant was conclusive at the end of the term and could not be reopened later so as to render a decree for improvements. *Brown v. Norvell*, 88 Ark. 590, 115 S.W. 372 (1909); *Gaither v. Campbell*, 94 Ark. 329, 126 S.W. 1061 (1910).

Good Faith.

Improvements held not to be made in good faith. *Graves v. Bean*, 200 Ark. 863, 141 S.W.2d 50 (1940); *Vernon v. McEntire*, 234 Ark. 995, 356 S.W.2d 13 (1962).

One is not entitled to betterments for improvements unless he has acted in good faith in making improvements. *Welch v. Burton*, 221 Ark. 173, 252 S.W.2d 411 (1952).

Under this section, "good faith" means in honest belief and ignorance that any other person claims a better right to the

land. *Vernon v. McEntire*, 234 Ark. 995, 356 S.W.2d 13 (1962).

Occupants of land, claiming reimbursement for improvements made thereon, had the burden of proving the improvements were made in good faith. *Vernon v. McEntire*, 234 Ark. 995, 356 S.W.2d 13 (1962).

—Notice of Paramount Title.

Notice of the paramount title must be actual, not constructive. *Beard v. Dansby*, 48 Ark. 183, 2 S.W. 701 (1886); *Shepherd v. Jernigan*, 51 Ark. 275, 10 S.W. 765 (1888); *White v. Stokes*, 67 Ark. 184, 53 S.W. 1060 (1899).

Holder aware of claims of heirs to original owner held not entitled to compensation for improvements. *Douglass v. Hunt*, 98 Ark. 320, 136 S.W. 170 (1911); *Welch v. Burton*, 221 Ark. 173, 252 S.W.2d 411 (1952).

One who placed improvements upon the land of another after he had been notified of the latter's ownership could not be said to have placed them in good faith and was not entitled to recover therefor. *Foltz v. Alford*, 102 Ark. 191, 143 S.W. 905 (1912).

Purchaser by quitclaim deed of land subject to recorded deed of trust was not entitled upon foreclosure of deed of trust to recover from purchaser at the foreclosure sale the value of the improvement he put on the land. *Vernon v. Lincoln Nat'l Life Ins. Co.*, 200 Ark. 47, 138 S.W.2d 61 (1940).

One chargeable with notice as to the kind of title he holds may not make such improvements as will impair the title in fee. *Graves v. Bean*, 200 Ark. 863, 141 S.W.2d 50 (1940).

Notice of a prior title must be actual and not constructive, so that recording of prior deed does not defeat right of second purchaser of tax title to cash value of improvements. *Topham v. Hodges*, 215 Ark. 407, 221 S.W.2d 27 (1949).

Husband of life tenant who redeemed property from taxes for benefit of wife was not entitled to claim that he believed he was the owner. *Ingram v. Seaman*, 223 Ark. 414, 267 S.W.2d 6 (1954).

Improvements made with the knowledge that another is claiming interest in the property cannot be characterized as improvements made under a bona fide belief of ownership as required by this section. *Lawrence v. Lawrence*, 231 Ark.

324, 329 S.W.2d 416 (1959); *Jones v. Jones*, 22 Ark. App. 179, 737 S.W.2d 654 (1987).

Where all the improvements made by wife were made after she had notice that she merely had possession of the property until further orders of the court providing for a sale of the marital home, and that the husband had an interest in the property, the Betterment Act did not apply. *Jones v. Jones*, 22 Ark. App. 179, 737 S.W.2d 654 (1987).

Judgment Lien Creditor.

Arkansas Betterment Act, § 18-60-213, was inapplicable to a property buyer's claim against a judgment creditor bank; although the buyer made substantial improvements to the property after buying it from the judgment debtors, the buyer took title subject to the lien of the judgment creditor bank's judgment. *Canady v. Petit Jean State Bank*, 2015 Ark. App. 313, 463 S.W.3d 328 (2015).

Life Estates.

Life tenant cannot recover from remainderman for repairs, since it is the duty of the life tenant to keep property in repair. *Frazier v. Hanes*, 220 Ark. 765, 249 S.W.2d 842 (1952).

A life tenant was not entitled to an award under the statutes for improvements made to the land since (1) she testified that, at the time she moved to the property at issue, she knew that she and her husband only had a right to live on the property for the life of her husband and son, and (2) she had no basis for a good-faith belief that she held the property under color of title at the time the improvements were made as her name was not on the deed granting the life estate. *Acord v. Acord*, 70 Ark. App. 409, 19 S.W.3d 644 (2000).

Option to Repurchase.

A grantee who made improvements upon real estate was not entitled to reimbursement for the cost of such improvements upon the exercise by the grantor of an option contained in the deed to repurchase the real estate for the original consideration recited in the deed. *Berry v. Bierman*, 248 Ark. 440, 451 S.W.2d 867 (1970).

Payment.

Plaintiff who has not paid judgment for improvements cannot recover possession

even after expiration of time for enforcing lien. *Douglass v. Sharp*, 64 Ark. 645, 44 S.W. 221 (1898).

Where improvement assessments are distributed over a period of years, a ratable and equitable distribution of the burden requires the life tenant to discharge the annual assessments during each year of his occupancy. *Crowell v. Seelbinder*, 185 Ark. 769, 49 S.W.2d 389 (1932).

Where part owners of land sold at a partition sale had made improvements to the land, the value of the improvements was entitled to priority in the proceeds following the deduction of court costs and awarded attorney's fees. *Crouch v. Crouch*, 251 Ark. 1047, 476 S.W.2d 248 (1972).

Persons under Disability.

Minors and insane persons are entitled to recover land sold at a void judicial sale notwithstanding the lapse of time subject only to the purchaser's right to betterments. *Cowling v. Nelson*, 76 Ark. 146, 88 S.W. 913 (1905).

The infancy of the plaintiff does not defeat betterments. *Beard v. Dansby*, 48 Ark. 183, 2 S.W. 701 (1886).

Purchasers at Judicial Sales.

Where purchaser of land at administrator's sale acted in good faith and acquired and held possession believing that he had the right to do so, he was a bona fide occupant of the land entitled to recover the value of the improvements made and taxes paid by him on the land and liable only for mesne profits which accrued within three years next before the commencement of the suit in which they may be claimed. *Brown v. Nelms*, 86 Ark. 368, 112 S.W. 373 (1908).

One who purchases lands at a judicial sale based upon a decree which was subsequently reversed may be entitled to recover the value of improvements placed upon the land before the appeal was taken if he purchased in good faith and held possession without actual notice that his title was assailed by one claiming a better title. *McDonald v. Rankin*, 92 Ark. 173, 122 S.W. 88 (1909).

Rents and Profits.

In ejectment case, where no demand was made for rents and profits, it was held

that defendants, who took possession under void tax sale, were not entitled to recover the value of their improvements. *Buswell v. Hadfield*, 202 Ark. 200, 149 S.W.2d 555 (1941).

Part owner could not be given lien upon proceeds of partition sale until it was established that the value of his improvements exceeded the rents and profits realized from the land by him. *Crouch v. Crouch*, 245 Ark. 67, 431 S.W.2d 261 (1968).

The owners of a fractional interest in land were entitled to have their portion of the accumulated rents and profits collected by the owner of the other fractional interest set off against the value of improvements made by such part owner in the belief that he owned the entire fee. *Crouch v. Crouch*, 245 Ark. 67, 431 S.W.2d 261 (1968).

Tenants in Common.

A tenant in common has the right to make improvements on the land without the consent of his cotenants; and, although he has no lien on the land for the value of his improvements, he will be indemnified for them, in a proceeding in equity to partition the land between himself and cotenants, either by having the part upon which the improvements are located allotted to him or by having compensation for them, if thrown into the common mass, because tenants in common might be improved out of their property; however, the cotenant can only receive the enhancement value of the improvement to the property. *Graham v. Inlow*, 302 Ark. 414, 790 S.W.2d 428 (1990).

Cited: *Collins v. Paepcke-Leicht Lumber Co.*, 82 Ark. 1, 100 S.W. 86 (1907); *Brasher v. Taylor*, 109 Ark. 281, 159 S.W. 1120 (1913); *Baxter v. Young*, 229 Ark. 1035, 320 S.W.2d 640 (1959); *McDowell v. King*, 266 Ark. 1005, 589 S.W.2d 594 (Ct. App. 1979); *Neal v. Jackson*, 2 Ark. App. 14, 616 S.W.2d 746 (1981); *Smith v. Stewart*, 10 Ark. App. 201, 662 S.W.2d 202 (1983); *Thorne v. Magness*, 34 Ark. App. 39, 805 S.W.2d 95 (1991); *Carter v. Cox*, 2014 Ark. App. 654 (2014).

18-60-214. Lien of tax deed holder for improvement by reason of survey.

(a)(1) If any person believing himself or herself to be the owner, either in law or equity, under a clerk's tax deed or a Commissioner of State Lands' forfeited land deed, containing a valid and proper description constituting color of title, has, or shall, peaceably improve any land by having the boundaries surveyed and corners established by the county surveyor of the county in which the land is situated and, upon judicial investigation of the title to the land, it is found that the forfeiture for nonpayment of taxes is void and that the land belongs to another or that the former owner is entitled to redeem from the tax forfeiture, the value of the improvement to the land by reason of the survey shall be paid by the successful party to the holder of the tax deed.

(2) The holder of the tax deed shall have a lien on the lands for this amount, which may be enforced by equitable proceedings at any time within three (3) years after the date of the judgment.

(b) This section shall not repeal any statute providing for recovery of improvements and betterments but shall be cumulative to § 18-60-213(a) and to all other existing laws not inconsistent with it.

History. Acts 1947, No. 87, §§ 1, 2; A.S.A. 1947, §§ 34-1427, 34-1428.

SUBCHAPTER 3 — FORCIBLE ENTRY AND DETAINER — UNLAWFUL DETAINER

SECTION.

- 18-60-301. Legislative intent.
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SECTION.

- 18-60-309. Judgment for plaintiff — Assessment of damages — Writs of possession and restitution.
- 18-60-310. Execution of writ of possession.
- 18-60-311. Judgment for defendant.
- 18-60-312. Other causes of action not precluded.

Cross References. Exemption of banks and savings and loans institutions from bond requirement, § 23-32-301 et seq.

Limitation of actions, § 18-61-104.

Effective Dates. Acts 1981, No. 615, § 14: approved Mar. 23, 1981. Emergency clause provided: "The procedure by which tenants may preserve their rights to possession of property and landlords, entitled

thereto, may recover possession in appropriate cases is a matter of vital importance to the public health, safety and welfare, and the clarification of certain confusion which exists with respect thereto in the current law being necessary for the preservation of the public health, safety and welfare, this Act shall be and remain in full force and effect from and after the date of its passage."

RESEARCH REFERENCES

ALR. Willfulness or malice justifying landlord's collection of statutory multiple damages for tenant's wrongful retention of possession. 7 A.L.R.4th 589.

Am. Jur. 35A Am. Jur. 2d, Forc. Ent., § 1 et seq.

Ark. L. Rev. Use of the Writ of Assistance in Arkansas, 8 Ark. L. Rev. 92.

C.J.S. 36A C.J.S., Forc. Ent., § 1 et seq.

U. Ark. Little Rock L.J. Arkansas Law Survey, Scroggins, Property, 9 U. Ark. Little Rock L.J. 199.

Note, Forcible Entry and Detainer — Statutory Prohibition of Landlord Self-

help Remedies, etc., 9 U. Ark. Little Rock L.J. 683.

U. Ark. Little Rock L. Rev. Non-Legislative Commission on the Study of Landlord-Tenant Laws: Report to Governor Mike Beebe, President Pro Tempore of the Senate, and Speaker of the House December 31, 2012, 35 U. Ark. Little Rock L. Rev. 739 (2013).

Marshall Prettyman, Landlord Protection Law Revisited: The Amendments to the Arkansas Residential Landlord-Tenant Act of 2007, 35 U. Ark. Little Rock L. Rev. 1031 (2013).

18-60-301. Legislative intent.

(a) Acts 1875, No. 85 [repealed], as amended by Acts 1875 (Adj. Sess.) No. 56; Acts 1891, No. 8 [repealed] and Acts 1947, No. 373 [repealed], which declare and describe the cause of action for forcible entry and detainer and unlawful detainer and prescribe the procedure for carrying out the rights and remedies granted to affected parties thereunder, is in need of clarification and revision in order that persons affected thereby may be afforded reasonable opportunity to be heard on legitimate objections to writs of possession entered in accordance with the provisions of this law.

(b) It is, therefore, found to be to the best interest of the people of this state that an additional procedure be specifically prescribed for the enforcement of the rights of parties claiming a cause of action by reason of forcible entry and detainer or unlawful detainer of real property and those persons against whom such causes of action are brought.

History. Acts 1981, No. 615, § 1; A.S.A. 1947, § 34-1501.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Lynn Foster, The Hands of the State: The Failure to Vacate Statute and Residential Tenants'

Rights In Arkansas, 36 U. Ark. Little Rock L. Rev. 1 (2013).

CASE NOTES

Termination of Sublease Prior to Bankruptcy.

Bankruptcy court found that the debtor's sublease was terminated by the creditor sublessor by service of a notice to quit almost five months before the debtor filed for bankruptcy. Thus, the sublease was

not part of the debtor's bankruptcy estate and the creditor was granted relief from the automatic stay to pursue the creditor's unlawful detainer action. Section 18-60-301 et seq., under which an agreed order had been entered in the detainer action, does not provide a tenant with an oppor-

tunity to cure a default before the issuance of a writ of possession. *Staffmark Inv. LLC v. Foote*, 277 B.R. 393 (Bankr. E.D. Ark. 2002).

Cited: *Gorman v. Ratliff*, 289 Ark. 332, 712 S.W.2d 888 (1986); *McCrory v. Johnson*, 296 Ark. 231, 755 S.W.2d 566 (1988).

18-60-302. Improper entry prohibited.

No person shall enter into or upon any lands, tenements, or other possessions and detain or hold them except when an entry is given by law, and then only in a peaceable manner.

History. Acts 1981, No. 615, § 2; A.S.A. 1947, § 34-1502.

CASE NOTES

Landlord and Tenant.

No entry by a landlord onto property occupied by another is given by this section, except by first resorting to legal process; accordingly, self-help action is prohibited. *Gorman v. Ratliff*, 289 Ark. 332, 712 S.W.2d 888 (1986).

The tenants did not waive their rights under the forcible entry and detainer statutes by executing the lease agreement which authorized the landlord's self-help remedy. *Gorman v. Ratliff*, 289 Ark. 332, 712 S.W.2d 888 (1986).

18-60-303. Actions constituting forcible entry and detainer.

A person shall be guilty of a forcible entry and detainer within the meaning of this subchapter if the person shall:

- (1) Enter into or upon any lands, tenements, or other possessions and detain or hold them without right or claim to title;
- (2) Enter by breaking open the doors and windows or other parts of the house, whether any person is in it or not;
- (3) Threaten to kill, maim, or beat the party in possession or use words and actions as have a natural tendency to excite fear or apprehension of danger;
- (4) Put out of doors or carry away the goods of the party in possession; or
- (5) Enter peaceably and then turning out by force or frightening by threats or other circumstances of terror the party to yield possession.

History. Acts 1981, No. 615, § 3; A.S.A. 1947, § 34-1503.

CASE NOTES

ANALYSIS

In General.
Purpose.
Force.
Landlord and Tenant.
Possession.
Railroads.

In General.

The remedy is designed to protect the actual possession, whether rightful or wrongful; it must be shown that the defendant entered without the consent of the person in actual possession, and that the entry or subsequent holding of possession was with force. *Johnson v. West*, 41

Ark. 535 (1883) (decision under prior law).

Purpose.

The purpose of former similar statute was to prevent all persons with or without title from assuming to right themselves with a strong hand when peaceable possession is withheld, as such action provokes breach of the peace. *Littell v. Grady*, 38 Ark. 584 (1881); *Anderson v. Mills*, 40 Ark. 192 (1882); *Grammer v. Blansett*, 93 Ark. 421, 124 S.W. 1037 (1910) (preceding decisions under prior law).

Force.

Force is the gist of the action, and it must be actual and hostile. *Hall v. Trucks*, 38 Ark. 257 (1881); *Miller v. Plummer*, 105 Ark. 630, 152 S.W. 288 (1912) (preceding decisions under prior law).

One having title and right of possession may get possession peaceably and hold by force and not be guilty of forcible entry and detainer. *Towell v. Etter*, 69 Ark. 38, 63 S.W. 53 (1901) (decision under prior law).

Actual physical force is not necessary. *Douglas v. Lamb*, 157 Ark. 11, 247 S.W. 77 (1923) (decision under prior law).

One has right to recover possession of which he was deprived through a reasonable fear that he may be maimed or beaten. *Holzman v. Gattis*, 195 Ark. 773, 114 S.W.2d 3 (1938) (decision under prior law).

18-60-304. Actions constituting unlawful detainer.

A person shall be guilty of an unlawful detainer within the meaning of this subchapter if the person shall, willfully and without right:

(1) Hold over any land, tenement, or possession after the determination of the time for which it was demised or let to him or her, or the person under whom he or she claims;

(2) Peaceably and lawfully obtain possession of any land, tenement, or possession and hold it willfully and unlawfully after demand made in writing for the delivery or surrender of possession of the land, tenement, or possession by the person having the right to possession or his or her agent or attorney;

(3) Fail or refuse to pay the rent for the land, tenement, or possession when due, and after three (3) days' notice to quit and demand made in writing for the possession of the land, tenement, or possession by the person entitled to the land, tenement, or possession or his or her agent or attorney, shall refuse to quit possession;

(4) Fail to maintain the premises in a safe, healthy, or habitable condition; or

Landlord and Tenant.

The tenants did not waive their rights under the forcible entry and detainer statutes by executing the lease agreement which authorized the landlord's self-help remedy. *Gorman v. Ratliff*, 289 Ark. 332, 712 S.W.2d 888 (1986).

Possession.

It is no defense that the defendant is legally entitled to the possession. *Logan v. Lee*, 53 Ark. 94, 13 S.W. 422 (1890) (decision under prior law).

As a present right of possession is essential to a recovery in forcible entry and detainer as well as unlawful detainer, a landlord cannot, during the term of a lease, recover the leased premises in either action from one who, by permission of a sub-lessee in possession as such, has taken possession of a portion of the premises under an adverse claim of title. *King v. Duncan*, 62 Ark. 588, 37 S.W. 228 (1896) (decision under prior law).

Railroads.

Part of a railroad may be recovered by a contractor who has been, by force and violence, turned out of possession after completion and before payment. *Iron Mt. & Helena R.R. v. Johnson*, 119 U.S. 608, 7 S. Ct. 339, 30 L. Ed. 504 (1887) (decision under prior law).

(5) Cause or permit the premises to become:

(A) A common nuisance subject to abatement under:

(i) Section 14-54-1501 et seq.;

(ii) The Arkansas Drug Abatement Act of 1989, § 16-105-401 et seq.; or

(iii) Any other law of this state; or

(B) A public or common nuisance under § 14-54-1701 et seq. as determined by a criminal nuisance abatement board.

History. Acts 1981, No. 615, § 4; A.S.A. 1947, § 34-1504; Acts 2005, No. 1431, § 1.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey, Miscellaneous — Property, 13 U. Ark. Little Rock L.J. 386.

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General Assembly, Property Law, 28 U. Ark. Little Rock L. Rev. 385.

Lynn Foster, The Hands of the State: The Failure to Vacate Statute and Residential Tenants' Rights In Arkansas, 36 U. Ark. Little Rock L. Rev. 1 (2013).

CASE NOTES

ANALYSIS

In General.

Jury Instructions.

Notice.

Possession.

Proof.

Right to Bring Action.

—Landlord-Tenant Relationship.

Waiver.

In General.

Failure or refusal of a tenant to pay rent when due, and to quit possession after demand therefor in writing, is a ground for action of unlawful detainer, independent of its being a ground of forfeiture in the contract or lease. *Parker v. Geary*, 57 Ark. 301, 21 S.W. 472 (1893) (decision under prior law).

Trial court erred in holding that a subtenant was an assignee rather than a sublessee and was not required to surrender possession of commercial premises upon breach by original lessee where the subtenant and original lessee's intention was that they consistently referred to their arrangement as a sublease; further, in their pleadings and at trial, the parties exclusively referred to the original tenant's transfer to the subtenant as a sublease rather than an assignment. *Aber-*

nathy v. Adous, 85 Ark. App. 242, 149 S.W.3d 884 (2004).

Jury Instructions.

Trial court did not abuse its discretion in giving jury instructions on the unlawful detainer statute and the criminal possession of real property statute because the instructions were correct statements of the law since they tracked the statutory language of subdivision (2) of this section and § 18-16-101(a) and (b)(1); there was some basis in the evidence to give the instructions because the lawfulness of the respective parties' legal right to possess real property bore on the issue of punitive damages, and the evidence did not demonstrate that an unlawful detainer action or misdemeanor charges were ever filed, but it was evident that there could have been grounds for such civil or criminal proceedings given the evidence adduced at trial. *Schmidt v. Stearman*, 2010 Ark. App. 274, 374 S.W.3d 254 (2010).

Notice.

A disclaimer of the landlord's right is a waiver of the notice. *Wood v. Davenport*, 156 Ark. 598, 247 S.W. 69 (1923) (decision under prior law).

In counting the notice to quit, the day of serving notice may be counted. *Whitner v.*

Thompson, 188 Ark. 240, 65 S.W.2d 28 (1933) (decision under prior law).

Notice held sufficient. Sinclair Ref. Co. v. Lowery, 198 Ark. 788, 131 S.W.2d 633 (1939); Lingo v. Myers, 211 Ark. 638, 201 S.W.2d 745 (1947) (preceding decisions under prior law).

A tenant holding over and paying rent for another year becomes a tenant for years entitled to six months' notice, but if there is a new rental agreement for a year, the tenant holds for that year and is only entitled to the statutory notice to vacate in event he holds possession after the expiration of the term of his lease. Chapell v. Reynolds, 206 Ark. 452, 176 S.W.2d 154 (1943) (decision under prior law).

Where there is an allegation in the complaint that there was a default in rent, it is necessary to prove service of notice and order to quit for only three days. Lingo v. Myers, 211 Ark. 638, 201 S.W.2d 745 (1947) (decision under prior law).

In an unlawful-detainer action, trial court's award of treble damages for the period prior to the filing of the formal notice to vacate was proper because all subdivision (3) of this section required in cases of failure to pay rent was three days' written notice to quit and demand for possession. According to the owner's testimony, that was provided by her attorney's letter. Mendez v. Aguilar, 2010 Ark. App. 268 (2010).

Possession.

It is no defense that the defendant is legally entitled to the possession. Logan v. Lee, 53 Ark. 94, 13 S.W. 422 (1890) (decision under prior law).

As a present right of possession is essential to a recovery in forcible entry and detainer as well as unlawful detainer, a landlord cannot, during the term of a lease, recover the leased premises in either action from one who, by permission of a sub-lessee in possession as such, has taken possession of a portion of the premises under an adverse claim of title. King v. Duncan, 62 Ark. 588, 37 S.W. 228 (1896) (decision under prior law).

Allegation held sufficient to assert that plaintiff was entitled to possession. Lingo v. Myers, 211 Ark. 638, 201 S.W.2d 745 (1947) (decision under prior law).

In an unlawful detainer suit, the landlord is not required to deraign title as title is not involved in the suit but only the

right of possession. McGee v. Nuckols, 136 F. Supp. 948 (E.D. Ark. 1955) (decision under prior law).

Proof.

Proof that defendant was the tenant at will of the plaintiff, demand of possession and refusal, are sufficient to maintain the action. Brockway v. Thomas, 36 Ark. 518 (1880) (decision under prior law).

Substantial evidence supported finding of a city's unlawful detainer, and, because substantial evidence of the rent due was presented, there was no need for evidence of fair market value; however, the triple damages award against the city was error because the space rented by the city was used as a courtroom, and was not used for any purpose pertaining to commerce. Thus, there was no entitlement to triple damages under § 18-60-309(b)(2). City of Pine Bluff v. Pine Bluff/Jefferson County Library, 2010 Ark. 327 (2010).

Unlawful detainer summary judgment was proper because appellant tenant did not show occupancy under a license granted in an oral partnership agreement; no partnership existed and the tenant occupied the premises at will. Anderson's Taekwondo Ctr. Camp Positive, Inc. v. Landers Auto Group No. 1, Inc., 2015 Ark. 268 (2015).

Summary judgment on appellant's counterclaim for promissory estoppel and detrimental reliance was reversed because appellant provided proof that there was an agreement or promise between the parties and that it allegedly relied on that agreement in expending money to improve the property, a service bay at a car dealership; a genuine issue of material fact remained as to whether appellant detrimentally relied on appellee's promise to use the property and what improvements were actually made by appellant. Anderson's Taekwondo Ctr. Camp Positive, Inc. v. Landers Auto Group No. 1, Inc., 2015 Ark. 268 (2015).

Right to Bring Action.

Unlawful detainer is a remedy for the benefit of landlords against tenants who hold over after the expiration of their term and may be maintained either by the lessor, his heirs or assignee, to whom the land passes. See Buckner v. Warren, 41 Ark. 532 (1883); Johnson v. West, 41 Ark. 535 (1883) (preceding decisions under prior law).

Unlawful detainer will lie where there has been a sale of land with a stipulation that upon the failure of the vendee to pay at maturity, he shall pay rent. *Ish v. McRae*, 48 Ark. 413, 3 S.W. 440 (1886) (decision under prior law).

Grantee or assignee of landlord may bring unlawful detainer. *Cherry v. Kirkland*, 138 Ark. 33, 210 S.W. 344 (1919) (decision under prior law).

Grantees who held for owner's benefit could not maintain unlawful detainer action. *Hilliard v. Jen Yim*, 207 Ark. 161, 179 S.W.2d 456 (1944) (decision under prior law).

Willful holding over necessary to support a judgment for treble damages was not required to support an action for unlawful detainer. *Heral v. Smith*, 33 Ark. App. 143, 803 S.W.2d 938 (1991).

—Landlord-Tenant Relationship.

Unlawful detainer will not lie save where the relation of landlord and tenant exists. *Dortch v. Robinson*, 31 Ark. 296 (1876); *Necklace v. West*, 33 Ark. 682 (1878); *Mason v. Delancy*, 44 Ark. 444 (1884); *Lindsey v. Bloodworth*, 97 Ark. 541, 134 S.W. 959 (1911); *Miller v. Plummer*, 105 Ark. 630, 152 S.W. 288 (1912); *White River Land & Timber Co. v. Hawkins*, 128 Ark. 277, 194 S.W. 9 (1917); *Dover v. Henderson*, 195 Ark. 496, 112 S.W.2d

963 (1938); *Cline v. Smith*, 205 Ark. 136, 167 S.W.2d 872 (1943); *Hilliard v. Jen Yim*, 207 Ark. 161, 179 S.W.2d 456 (1944) (preceding decisions under prior law).

Where lease and sublease had been canceled pursuant to provisions of the lease, sublessee became a tenant at will of lessor and action of unlawful detainer was maintainable. *Dover v. Henderson*, 195 Ark. 496, 112 S.W.2d 963 (1938) (decision under prior law).

The right of action for unlawful detainer is based on the contract relationship of landlord and tenant. *McGee v. Nuckols*, 136 F. Supp. 948 (E.D. Ark. 1955) (decision under prior law).

Evidence sufficient to establish relationship of landlord and tenant so as to sustain plaintiff's suit for unlawful detainer. *McGee v. Nuckols*, 136 F. Supp. 948 (E.D. Ark. 1955) (decision under prior law).

Waiver.

Failure to require prompt payment of rent waived right to enforce forfeiture. *Pierce v. Kennedy*, 205 Ark. 419, 168 S.W.2d 1115 (1943) (decision under prior law).

Cited: *Williams v. City of Pine Bluff*, 284 Ark. 551, 683 S.W.2d 923 (1985); *Antes v. Thompson*, 28 Ark. App. 304, 773 S.W.2d 846 (1989).

18-60-305. Applicability to all estates.

Sections 18-60-303 and 18-60-304 shall extend to and comprehend all estates, whether freehold or less than freehold.

History. Acts 1981, No. 615, § 5; A.S.A. 1947, § 34-1505.

18-60-306. Jurisdiction — Definition.

(a) Forcible entries and detainers and unlawful detainers are cognizable before the:

(1) Circuit court of any county in which the offenses may be committed; and

(2) District court with jurisdiction concurrent with the jurisdiction of the circuit court, if permitted by rule or order of the Supreme Court.

(b) As used in this subchapter, "court" means:

(1) A circuit court; and

(2) If permitted by rule or order of the Supreme Court, a district court.

History. Acts 1981, No. 615, § 6; A.S.A. 1947, § 34-1506; Acts 2007, No. 535, § 1.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Marshall Residential Landlord-Tenant Act of 2007, 35 U. Ark. Little Rock L. Rev. 1031 (2013).
 Prettyman, Landlord Protection Law Revisited: The Amendments to the Arkansas

CASE NOTES

Transfer.

An action for unlawful detainer is cognizable before the circuit court, and should not be transferred to equity. Texas

Hardwood Lumber Co. v. Richardson, 115 Ark. 28, 170 S.W. 481 (1914) (decision under prior law).

18-60-307. Proceedings in court.

(a) When any person to whom any cause of action shall accrue under this subchapter shall file in the office of the clerk of the court a complaint signed by him or her, his or her agent or attorney, specifying the lands, tenements, or other possessions so forcibly entered and detained, or so unlawfully detained over, and by whom and when done, and shall also file the affidavit of himself or herself or some other credible person for him or her, stating that the plaintiff is lawfully entitled to the possession of the lands, tenements, or other possessions mentioned in the complaint and that the defendant forcibly entered upon and detained them or unlawfully detains them, after lawful demand therefor made in the manner described in this subchapter, the clerk of the court shall thereupon issue a summons upon the complaint. The summons shall be in customary form directed to the sheriff of the county in which the cause of action is filed, with direction for service thereof on the named defendants. In addition, he or she shall issue and direct the sheriff to serve upon the named defendants a notice in the following form:

“NOTICE OF INTENTION TO ISSUE WRIT OF POSSESSION

You are hereby notified that the attached complaint in the above styled cause claims that you have been guilty of [forcible entry and detainer] [unlawful detainer] (the inapplicable phrase shall be deleted from the notice) and seeks to have a writ of possession directing the sheriff to deliver possession of the lands, tenements, or other possessions described in the complaint delivered to the plaintiff. If, within five (5) days, excluding Sundays and legal holidays, from the date of service of this notice, you have not filed in the office of the clerk of this court a written objection to the claims made against you by the plaintiff for possession of the property described in the complaint, then a writ of possession shall forthwith issue from this office directed to the sheriff of this county and ordering him to remove you from possession of the property described in the complaint and to place the plaintiff in possession thereof. If you should file a written

objection to the complaint of the plaintiff and the allegations for immediate possession of the property described in the complaint within five (5) days, excluding Sundays and legal holidays, from the date of service of this notice, a hearing will be scheduled by the court to determine whether or not the writ of possession should issue as sought by the plaintiff. If you continue to possess the property described in the complaint, you are required to deposit into the registry of the court a sum equal to the amount of rent due on the property and continue paying rent into the registry of the court during the pendency of these proceedings in accordance with your written or verbal rental agreement. Your failure to tender the rent due without justification is grounds for the court to grant the writ of possession.

Clerk of Circuit/District Court”

(b) If, within five (5) days, excluding Sundays and legal holidays, following service of this summons, complaint, and notice seeking a writ of possession against the defendants named therein, the defendant or defendants have not filed a written objection to the claim for possession made by the plaintiff in his or her complaint, the clerk of the court shall immediately issue a writ of possession directed to the sheriff commanding him or her to cause the possession of the property described in the complaint to be delivered to the plaintiff without delay, which the sheriff shall thereupon execute in the manner described in § 18-60-310.

(c)(1) If a written objection to the claim of the plaintiff for a writ of possession shall be filed by the defendant or defendants within five (5) days from the date of service of the notice, summons, and complaint as provided for in this section, the plaintiff shall obtain a date for the hearing of the plaintiff's demand for possession of the property described in the complaint at any time thereafter when the matter may be heard by the court and shall give notice of the date, time, and place of the hearing by certified mail, postage prepaid, either to the defendant or to his or her or their counsel of record.

(2) If the defendant continues to possess the property described in the plaintiff's complaint during the pendency of the proceedings under this subchapter, the defendant is required to deposit into the registry of the court at the time of filing the written objection a sum equal to the amount of rent due on the property and continue paying rent into the registry of the court in accordance with the written or verbal rental agreement.

(3) The failure of the defendant to deposit into the registry of the court the rent due or any rent subsequently due during the pendency of the proceeding under this subchapter without justification is grounds for the court to grant the writ of possession.

(d)(1)(A) If a hearing is required to be held on the demand of the plaintiff for an immediate writ of possession, the plaintiff shall there present evidence sufficient to make a prima facie case of entitlement to possession of the property described in the complaint. The defen-

dant or defendants shall be entitled to present evidence in rebuttal thereof.

(B)(i) If the court decides upon all the evidence that the plaintiff is likely to succeed on the merits at a full hearing and if the plaintiff provides adequate security as determined by the court, then the court shall order the clerk forthwith to issue a writ of possession to the sheriff to place the plaintiff in possession of the property described in the complaint, subject to the provisions of subsection (e) of this section.

(ii) No such action by the court shall be final adjudication of the parties' rights in the action.

(2) A plaintiff demanding an immediate writ of possession who is a housing authority and who claims in its complaint that the defendant or defendants are being asked to surrender possession as a result of the defendant or defendants having been convicted of a criminal violation of the Uniform Controlled Substances Act, § 5-64-101 et seq., shall be entitled to receive an expedited hearing before the court within ten (10) days of the filing of the objection by the defendant or defendants.

(e) If the defendant desires to retain possession of the property, the court shall allow the retention upon the defendant's providing, within five (5) days of issuance of the writ of possession, adequate security as determined by the court.

History. Acts 1981, No. 615, § 7; A.S.A. Sess.), No. 11, § 1; 2007, No. 535, § 2; 1947, § 34-1507; Acts 1989 (3rd Ex. 2007, No. 728, §§ 1, 2.

CASE NOTES

ANALYSIS

Appeal.
Bond.
Complaint.
Instructions.
Procedure.

Appeal.

Subdivision (d)(1) of this section expressly provides that an order directing the issuance of a writ of possession shall not be a final adjudication of the parties' rights in the action. *Coleman's Serv. Ctr., Inc. v. Southern Inns Mgt., Inc.*, 44 Ark. App. 45, 866 S.W.2d 427 (1993).

Where the issues appellant raised on an interlocutory appeal under ARCP 54(b) were totally unrelated to the interlocutory order that it was permitted to appeal, and all of the issues raised related to the primary cause of action, the suit for unlawful detainer under this section, which was still pending in the circuit court, the issues raised were not within the scope of

the appeal. *Coleman's Serv. Ctr., Inc. v. Southern Inns Mgt., Inc.*, 44 Ark. App. 45, 866 S.W.2d 427 (1993).

Bond.

A bond in unlawful detainer conditioned that, if the defendant delivered possession of the premises to the plaintiff together with the costs and damages awarded to the plaintiff if so directed by the court, the bond would be void was sufficient. *Richardson v. Harrell*, 62 Ark. 469, 36 S.W. 573 (1896) (decision under prior law).

Where plaintiff conveyed land during pendency of suit, it was error on rendering judgment for grantee to give judgment for damages against the sureties on the retention bond. *Brooks v. Buie*, 71 Ark. 44, 70 S.W. 464 (1902) (decision under prior law).

The amount of bond is not a designation of the elements of damage. *Turner v. Vaughan*, 152 Ark. 475, 238 S.W. 1059 (1922) (decision under prior law).

Judgment on a retaining bond may be taken at a subsequent term to that at

which the judgment was rendered against the principal. *Craig v. Collier*, 155 Ark. 538, 244 S.W. 717 (1922) (decision under prior law).

It is error to refuse to give judgment on retaining bond. *Thompson v. Kirk*, 165 Ark. 218, 263 S.W. 402 (1924) (decision under prior law).

The surety on a defendant's retaining bond is not liable for the destruction of the plaintiff's personal property by fire while in the defendant's possession. *Cook v. Barber*, 185 Ark. 494, 47 S.W.2d 800 (1932) (decision under prior law).

Consolidation for trial of forcible entry action with intervenor's ejectment action against plaintiff did not transform the forcible entry action into an ejectment action so as to preclude judgment against defendant in forcible entry action on bond filed to retain possession. *De Clerk v. Spikes*, 206 Ark. 1004, 178 S.W.2d 70 (1944) (decision under prior law).

A tenant unable to give a retaining bond did not waive his right to damages for wrongful eviction by vacating the premises before forcible eviction by the sheriff after posting of eviction bond by landlord. *Woods v. Kirby*, 238 Ark. 382, 382 S.W.2d 4 (1964) (decision under prior law).

Complaint.

Complaint held sufficient to allege failure to pay rent as agreed. *Martin v. Strat-*

ton, 157 Ark. 513, 248 S.W. 554 (1923) (decision under prior law).

Petition held sufficient to support suit in forcible entry. *Holzman v. Gattis*, 195 Ark. 773, 114 S.W.2d 3 (1938) (decision under prior law).

Complaint held insufficient to sustain an action for "forcible entry" or for "unlawful detainer." *Cline v. Smith*, 205 Ark. 136, 167 S.W.2d 872 (1943) (decision under prior law).

Instructions.

Instruction stating that plaintiff was entitled to possession upon showing he had legal title thereto, without finding that he was deprived of his possession by force, was error. *Holzman v. Gattis*, 195 Ark. 773, 114 S.W.2d 3 (1938) (decision under prior law).

Procedure.

Under this section, an action of unlawful detainer is a two-step process: the right to possession is to be preliminarily determined and, if appropriate, a writ of possession issued, but the question of damages will be left for a subsequent hearing. *Coleman's Serv. Ctr., Inc. v. Southern Inns Mgt., Inc.*, 44 Ark. App. 45, 866 S.W.2d 427 (1993).

Cited: *Gorman v. Ratliff*, 289 Ark. 332, 712 S.W.2d 888 (1986); *Abernathy v. Adous*, 85 Ark. App. 242, 149 S.W.3d 884 (2004); *Jacobs v. Collison*, 2015 Ark. App. 420 (2015).

18-60-308. Title to premises not adjudicated.

In trials under the provisions of this subchapter, the title to the premises in question shall not be adjudicated upon or given in evidence, except to show the right to the possession and the extent thereof.

History. Acts 1981, No. 615, § 11; A.S.A. 1947, § 34-1511.

CASE NOTES

ANALYSIS

In General.
Landlord's Title.
Title Not in Issue.

In General.

An action of unlawful detainer is only to decide the right to the immediate possession of lands and tenements and not to determine the rights or title of the parties

to such lands. *Cortiana v. Franco*, 212 Ark. 930, 208 S.W.2d 436 (1948) (decision under prior law).

Landlord's Title.

A tenant may not dispute his landlord's title without first having surrendered possession to the landlord. *Bolin v. Drainage Dist. No. 17*, 206 Ark. 459, 176 S.W.2d 143 (1943) (decision under prior law).

If the defendant admits his status as a

tenant he cannot defend his possession by asserting title to the land, but this does not mean that a defendant in this type of action can never prove that he owns the land; therefore, if defendant has denied the landlord-tenant relationship, he is entitled to bolster his denial on the trial by an attack on his adversary's title. *Webb v. Herpin*, 217 Ark. 826, 233 S.W.2d 385 (1950) (decision under prior law).

Title Not in Issue.

Only the right to possession can be questioned. *Grammer v. Blansett*, 93 Ark. 421, 124 S.W. 1037 (1910); *Prioleau v. Williams*, 104 Ark. 322, 149 S.W. 101 (1912) (preceding decisions under prior law).

The title to the land cannot be called in question. *Miller v. Plummer*, 105 Ark. 630, 152 S.W. 288 (1912) (decision under prior law).

A judgment in the action is not an adjudication of the title preceding an action of ejectment. *Williams v. Prioleau*, 123 Ark. 156, 184 S.W. 847 (1916) (decision under prior law).

In forcible entry action, the question to be decided is possession as distinguished from title and the result of the forcible entry action cannot be *res judicata* of title to property. *De Clerk v. Spikes*, 206 Ark. 1004, 178 S.W.2d 70 (1944) (decision under prior law).

18-60-309. Judgment for plaintiff — Assessment of damages — Writs of possession and restitution.

(a) If upon the trial of any action brought under this subchapter the finding or verdict is for the plaintiff, the court or jury trying it shall assess the amount to be recovered by the plaintiff for the rent due and agreed upon at the time of the commencement of the action and up to the time of rendering judgment or, in the absence of an agreement, the fair rental value.

(b) In addition thereto in all cases the court shall assess the following as liquidated damages:

(1) When the property sought to be recovered is used for residential purposes only, the plaintiff shall receive an amount equal to the rental value for each month, or portion thereof, that the defendant has forcibly entered and detained or unlawfully detained the property; and

(2) When the property sought to be recovered is used for commercial or mixed residential and commercial purposes, the plaintiff shall receive liquidated damages at the rate of three (3) times the rental value per month for the time that the defendant has unlawfully detained the property.

(c)(1) Thereupon the court shall render judgment in favor of the plaintiff for the recovery of the property and for any amount of recovery that may be so assessed with costs.

(2) If possession of the premises has not already been delivered to the plaintiff, the court shall cause a writ of possession to be issued commanding the sheriff to remove the defendant from possession of the premises and to place the plaintiff in possession thereof.

(d)(1) In case the finding or verdict is for the defendant, the court shall give judgment thereon with costs and for any damages that may be assessed in favor of the defendant.

(2) If the property described in the complaint has been turned over to the possession of the plaintiff, the court shall also issue a writ of restitution directed to the sheriff to cause the defendant to be repossessed of the property.

(e) Any monetary judgments awarded either to the plaintiff or the defendant may be recovered upon in any manner otherwise authorized by law.

(f) Upon final disposition of the action, the court shall distribute any money paid by the defendant under § 18-60-307(c) into the registry of the court first toward satisfaction of the plaintiff's judgment, if any, and the remainder to the defendant.

History. Acts 1981, No. 615, § 9; A.S.A. 1947, § 34-1509; Acts 2007, No. 728, § 3.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey of Arkansas Law, Property, 5 U. Ark. Little Rock L.J. 185.

CASE NOTES

ANALYSIS

Attorney's Fees.
Commercial Purposes.
Costs.
Damages.
Intervention.
Possession.
Rental Value.

Attorney's Fees.

A tenant is not entitled to attorney's fees for wrongful eviction. *Woods v. Kirby*, 238 Ark. 382, 382 S.W.2d 4 (1964) (decision under prior law).

Commercial Purposes.

Upon the recovery of possession of farm land from a tenant holding over, the plaintiff is not entitled to triple damages under this section, farm land not being included within the term "commercial purposes." *Sanders v. Keenan*, 244 Ark. 585, 426 S.W.2d 399 (1968) (decision under prior law).

Costs.

It was error to adjudge the costs against the defendant where there was insufficient evidence of possession by the plaintiff. *Salinger v. Gunn*, 61 Ark. 414, 33 S.W. 959 (1895) (decision under prior law).

Damages.

Damages cannot be enhanced by proof of loss of business profits. *Brockway v. Thomas*, 36 Ark. 518 (1880); *Richardson v. Harrell*, 62 Ark. 469, 36 S.W. 573 (1896);

Sumlin v. Woodson, 211 Ark. 214, 199 S.W.2d 936 (1947) (preceding decisions under prior law).

Storage charge for furniture, cost of packing and moving it to storage were proper elements of damages directly caused by defendant's refusal to surrender possession of leased premises on agreed date. *Coley v. Westbrook*, 206 Ark. 1111, 178 S.W.2d 991 (1944) (decision under prior law).

Where the party in possession of real estate refuses to surrender possession, but wrongfully retains possession, he agrees to pay the owner, not only the rent but damages for such wrongful withholding. Damages include a judgment against the owner for failure to give possession, costs and attorney fees and a reasonable travel expense. *Garrott v. Kendal*, 212 Ark. 210, 205 S.W.2d 192 (1947).

Tenant cannot be assessed treble damages for holding over unless it is shown that holding over was "wilful and without right." *Johnson v. Taylor*, 220 Ark. 46, 246 S.W.2d 121 (1952) (decision under prior law).

Where evidence showed that tenant signed written lease giving him three year lease with option of renewal for three years, which landlord refused to sign, but allowed tenant to remain for three years, tenant was not liable for treble damage by holding over even though landlord contended lease was from month to month. *Johnson v. Taylor*, 220 Ark. 46, 246 S.W.2d 121 (1952) (decision under prior law).

Where prospective purchaser held over under a bona fide though mistaken belief that he had a right to hold over prayer for double damages was denied. *Creighton v. Huggins*, 227 Ark. 1096, 303 S.W.2d 893 (1957) (decision under prior law).

In the absence of a showing that there was willful and wrongful detainer, landlord was not entitled to triple damages. *Warmack v. Merchants Nat'l Bank*, 272 Ark. 166, 612 S.W.2d 733 (1981).

Seller entitled to unpaid rent based on twice the amount of fair rental value under unlawful detainer law notwithstanding purchasers' argument that under the contract, they did not owe seller anything at the time suit was filed. *Perryman v. Hackler*, 323 Ark. 500, 916 S.W.2d 105 (1996).

Treble damages disallowed although purchasers did not vacate the property when demand was made and did not surrender the property until ordered to do so by the court, since before such liability can be imposed, there must be a finding of willful or wrongful holding over, and there was no argument characterizing purchasers' failure to vacate as wrongful. *Harvill v. Bevans*, 52 Ark. App. 57, 914 S.W.2d 784 (1996).

Where trial court found son unlawfully detained his father's property but only awarded damages in the amount of the fair-market-rental value from August 17, 2001, until possession of said lands was delivered; in contravention of subdivision (b)(1) of this section, the circuit court failed to award the mandated liquidated damages in the amount of \$300 per month for the same time period. *Waterall v. Waterall*, 85 Ark. App. 363, 155 S.W.3d 30 (2004).

Court properly awarded landlord treble damages for tenants' holdover where tenants' failure to vacate was willful; tenants were told by landlord in an October 2 letter that a default would be declared if they performed again in an untimely manner, however, tenants failed to tender the November rent until November 4 and then asserted, without a reasonable basis therefore, that their payment was timely. *Southway Corp. v. Metro. Realty & Dev. Co., LLC*, 90 Ark. App. 51, 206 S.W.3d 250 (2005).

Substantial evidence supported finding of a city's unlawful detainer, and, because substantial evidence of the rent due was

presented, there was no need for evidence of fair market value; however, the triple damages award against the city was error because the space rented by the city was used as a courtroom, and was not used for any purpose pertaining to commerce. Thus, there was no entitlement to triple damages under subdivision (b)(2) of this section. *City of Pine Bluff v. Pine Bluff/Jefferson County Library*, 2010 Ark. 327 (2010).

In an unlawful-detainer action, a store owner was entitled to back rental and treble damages pursuant to subdivision (b)(2) of this section because the trial court did not abuse its discretion under Ark. R. Civ. P. 15(b) in refusing to dismiss the owner's treble-damages claim, which was pled the day of trial. It was apparent from the commencement of the proceeding that the property involved was commercial. *Mendez v. Aguilar*, 2010 Ark. App. 268 (2010).

Use of the word "shall" in subsection (b) of this section mandates an award of liquidated damages to the owner in an action for unlawful detainer. *Cleary v. Sledge Props.*, 2010 Ark. App. 755, 379 S.W.3d 680 (2010).

Intervention.

Intervener in forcible entry action who unsuccessfully asserted title against plaintiff was not entitled to complain of judgment holding her jointly and severally liable with tenant for damages and rent on property of which tenant remained in possession pending litigation. *De Clerk v. Spikes*, 206 Ark. 1004, 178 S.W.2d 70 (1944) (decision under prior law).

Possession.

A judgment awarding the defendant possession of land and house held proper. *Davis v. Goodman*, 62 Ark. 262, 35 S.W. 231 (1896) (decision under prior law).

Judgment for restitution of the premises to the defendant on a verdict awarding damages for unlawful eviction was proper. *Wakin v. Morgan*, 165 Ark. 234, 263 S.W. 783 (1924) (decision under prior law).

Rental Value.

Testimony as to what the premises would rent for is not the only way, but is at least one way, of ascertaining the rental value in an unlawful detainer action.

Sumlin v. Woodson, 211 Ark. 214, 199 S.W.2d 936 (1947) (decision under prior law).

After awarding summary judgment to defendant on plaintiff's adverse possession claim, a trial court erred under subsection (a) of this section in denying defendant's claim for damages on its unlawful detainer counterclaim; if the use of the word "shall" was deemed to mandate an award of liquidated damages un-

der subsection (b), it was deemed to mandate an award of damages for the fair market rental of the property under subsection (a). Cleary v. Sledge Props., 2010 Ark. App. 755, 379 S.W.3d 680 (2010).

Cited: Gorman v. Ratliff, 289 Ark. 332, 712 S.W.2d 888 (1986); Anthes v. Thompson, 28 Ark. App. 304, 773 S.W.2d 846 (1989); Heral v. Smith, 33 Ark. App. 143, 803 S.W.2d 938 (1991).

18-60-310. Execution of writ of possession.

(a) Upon receipt of a writ of possession from the clerk of the court, the sheriff shall immediately proceed to execute the writ in the specific manner described in this section and, if necessary, ultimately by ejecting from the property described in the writ the defendant or defendants and any other person or persons who shall have received or entered into the possession of the property after the issuance of the writ, and thereupon notify the plaintiff that the property has been vacated by the defendant or defendants.

(b)(1) Upon receipt of the writ, the sheriff shall notify the defendant of the issuance of the writ by delivering a copy thereof to the defendant or to any person authorized to receive summons in civil cases and in like manner.

(2) If, within eight (8) hours of receipt of the writ of possession, the sheriff shall not find any such person at their normal place of residence, he or she may serve the writ of possession by placing a copy conspicuously upon the front door or other structure of the property described in the complaint, which shall have like effect as if delivered in person pursuant to the terms of this section.

(c)(1) If, at the expiration of twenty-four (24) hours from the service of the writ of possession in the manner indicated, the defendants or any or either of them shall be and remain in possession of the property or possession has not been returned to the plaintiff, the sheriff shall notify the plaintiff or his or her attorney of that fact and shall be provided with all labor and assistance required by him or her in removing the possessions and belongings of the defendants from the affected property to a place of storage in a public warehouse or in some other reasonable safe place of storage under the control of the plaintiff until a final determination by the court.

(2) If the determination is in favor of the defendant, then the possessions and belongings of the defendant shall be immediately restored to the defendant with the cost of storage assessed against the plaintiff.

(3) If the determination is in favor of the plaintiff, and it includes a monetary judgment for the plaintiff, then the court shall order the possessions and belongings of the defendant sold by the plaintiff in a commercially reasonable manner with the proceeds of the sale applied

first to the cost of storage, second to any monetary judgment in favor of the plaintiff, and third any excess to be remitted to the defendant.

(d) In executing the writ of possession, the sheriff shall have the right forcibly to remove all locks or other barriers erected to prevent entry upon the premises in any manner which he or she deems appropriate or convenient and, if necessary, physically to restrain the defendants from interfering with the removal of the defendants' property and possessions from the property described in the writ of possession.

(e) The plaintiff shall not be required to give any bond, unless ordered to do so by the court, as a condition to the execution of the writ by the sheriff.

(f) The sheriff shall return the writ at or before the return date of the writ and shall state in his or her return the manner in which he or she executed the writ and whether or not the properties described therein have been delivered to the plaintiff and, if not, the reason for his or her failure to do so.

History. Acts 1981, No. 615, § 8; A.S.A. 1947, § 34-1508; Acts 1987, No. 577, § 1; 2007, No. 535, § 3.

Cross References. Landlords' liens, § 18-41-101 et seq.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey — Property, 10 U. Ark. Little Rock L.J. 605.

CASE NOTES

ANALYSIS

Construction.
Bond.

Construction.

Former similar section was remedial and would be liberally construed. *Felder v. Hall Bros. Co.*, 146 Ark. 94, 225 S.W. 230 (1920) (decision under prior law).

Where the sheriff, relying upon a mandate from the court, executed an Order of Immediate Possession on defendant and was of the understanding that he had complied with this section, based on the totality of the circumstances, suppressing the evidence would not serve the remedial

purposes of the exclusionary rule. *Deshazo v. State*, 95 Ark. App. 398, 237 S.W.3d 493 (2006).

Bond.

Execution of a bond by the defendant at any time before the defendant is ousted stays further proceedings and it is the duty of the officer to accept the bond if tendered before ouster even though the specified time had expired. *Felder v. Hall Bros. Co.*, 146 Ark. 94, 225 S.W. 230 (1920) (decision under prior law).

Cited: *McGee v. Nuckols*, 136 F. Supp. 948 (E.D. Ark. 1955) (decision under prior law).

18-60-311. Judgment for defendant.

(a) In all cases of forcible entry and detainer and unlawful detainer, when the defendant disputes the plaintiff's right of possession, it shall be lawful for the defendant to introduce before the court or the jury trying the main issue in the action evidence showing the damage he or

she may have sustained in being dispossessed of the lands and premises mentioned in the complaint.

(b) The jury, if they find for the defendant, shall at the same time find what damage the defendant has sustained by being dispossessed, if he or she has been so dispossessed, under the provisions of this subchapter, for all of which the court shall render judgment restoring the property to the defendant, as provided for in this subchapter, and shall render judgment against the plaintiff and any surety on any bond posted by the plaintiff for damages as found by the jury, as well as the costs of the suit.

History. Acts 1981, No. 615, § 10; A.S.A. 1947, § 34-1510.

CASE NOTES

Damages.

The defendant, where his occupancy is without right, cannot recover damages from the true owner. It is only where the defendant disputes the right of possession that he can introduce evidence showing that he has sustained damages by being dispossessed. *White River Land & Timber Co. v. Hawkins*, 128 Ark. 277, 194 S.W. 9 (1917); *Denton v. Young*, 154 Ark. 538, 242 S.W. 801 (1922) (preceding decisions under prior law).

One wrongfully and unlawfully ousted from the possession of real estate by means of a writ of forcible entry and detainer is entitled to have any damages sustained by him assessed by the jury trying the main issue and to a judgment for the amount so assessed. *Denton v. Young*, 145 Ark. 147, 223 S.W. 380 (1920) (decision under prior law).

Cited: *Harness v. Curtis*, 87 Ark. App. 337, 192 S.W.3d 267 (2004).

18-60-312. Other causes of action not precluded.

(a) Neither the judgment to be rendered by the court in matters brought pursuant to the provisions of this subchapter nor anything in this subchapter shall bar or preclude the party injured from bringing any cause of action for trespass or ejectment, or any other action, against the offending party.

(b) All claims, causes of action, and actions which have accrued, occurred, or been filed prior to March 23, 1981, and arising under acts repealed shall be, and remain, in full force and effect, but shall be governed by the terms of this subchapter.

History. Acts 1981, No. 615, §§ 12, 13; A.S.A. 1947, § 34-1512.

§ 13 is partially codified in this section; the remainder of § 13 was a repealing clause.

Publisher's Notes. Acts 1981, No. 615,

CASE NOTES

ANALYSIS

Ejectment.
Intervention.
Trespass.

Ejectment.

One claiming title to realty could institute and prosecute an ejectment action against plaintiff in pending forcible entry action, contemporaneously with that ac-

tion. *De Clerk v. Spikes*, 206 Ark. 1004, 178 S.W.2d 70 (1944) (decision under prior law).

Intervention in forcible entry action by person claiming title to realty involved therein amounted to filing a complaint in ejectment against plaintiff, but the two actions, being both real actions, could be consolidated for purpose of trial. *De Clerk v. Spikes*, 206 Ark. 1004, 178 S.W.2d 70 (1944) (decision under prior law).

Intervention.

One could not institute another forcible entry action against the plaintiff in a

pending forcible entry action involving the same property, but, if interested, could intervene therein. *De Clerk v. Spikes*, 206 Ark. 1004, 178 S.W.2d 70 (1944) (decision under prior law).

Trespass.

A tenant in possession after the expiration of his lease, ejected by the landlord without unnecessary force and after legal proceedings for possession, has no action in trespass for damages. *Vinson v. Flynn*, 64 Ark. 453, 43 S.W. 146, 46 S.W. 186 (1897) (decision under prior law).

SUBCHAPTER 4 — PARTITION AND SALE OF LAND

SECTION.

- 18-60-401. Petition — Determination of heirs property — Applicability.
- 18-60-402. [Repealed.]
- 18-60-403. Parties generally.
- 18-60-404. [Repealed.]
- 18-60-405. Guardians for infants or individuals with mental illness.
- 18-60-406. Court-appointed guardians for minors.
- 18-60-407. Constructive service.
- 18-60-408. Intervention.
- 18-60-409. Court order for division.
- 18-60-410. Answer.
- 18-60-411. Entry of default.
- 18-60-412. Judgment.
- 18-60-413. No partition contrary to terms of will.
- 18-60-414. Appointment of commissioners.
- 18-60-415. Duties of commissioners.

SECTION.

- 18-60-416. Court action on commissioners' report.
- 18-60-417. Deeds of partition.
- 18-60-418. Costs.
- 18-60-419. Attorney's fees.
- 18-60-420. Sale of land not susceptible to division.
- 18-60-421. Commissioners or other interested parties not to purchase.
- 18-60-422. Report and confirmation of sale — Conveyances.
- 18-60-423. Distribution of sale proceeds.
- 18-60-424. Sale without commissioners.
- 18-60-425. Sale of improved land where infant or individual with mental illness coparcener, etc.
- 18-60-426. Sale of land held jointly or otherwise by incompetent person.

Cross References. Local actions, § 16-60-102.

Partition of oil and gas lease interests, § 15-73-401 et seq.

Preambles. Acts 1963, No. 518 contained a preamble which read: "Whereas, the attorney for the petitioners in partition suits prepares the papers, including decrees, distribution, and deeds, etc., in the partition proceedings, and

"Whereas, pretended defenses have been set up by which the courts have not set fees against all interested parties, and

"Whereas, many tracts in this state are

not being utilized due to the fact that the movant may have to pay the fees while those who are stifling the property will go free of costs;

"Therefore...."

Effective Dates. Acts 1941, No. 92, § 3: Feb. 25, 1941. Emergency clause provided: "It is hereby found and declared by the General Assembly that the present statute relative to partition of real property in Arkansas, having been enacted many years ago, is inadequate and not broad enough to provide this form of relief in numerous cases in the State of Arkan-

sas, and which are working an unjust hardship upon citizens owning property jointly, in common or in coparceny, absolutely or subject to the life estate of another or otherwise, and that such condition is hindering the alienation of real property and prejudicing the property rights of many citizens. Therefore an emergency is declared to exist, and this act, being necessary for the immediate preservation of the public peace, health and safety, shall take effect and be in full force from and after the date of its passage and approval."

Acts 1947, No. 161, § 3: Mar. 3, 1947. Emergency clause provided: "It is hereby found and declared by the General Assembly that the present statute relative to partition of real property in Arkansas, having been enacted many years ago, is inadequate and not broad enough to provide this form of relief in numerous cases in the State of Arkansas, and which are working an unjust hardship upon citizens owning property jointly, in common, or in coparceny, absolute or subject to the life estate of another or otherwise, or under an estate by the entirety, where said owner shall have been divorced either prior or subsequent to the passage of this act, and that such condition is hindering the alienation of real property and prejudicing the property rights of many citizens. Therefore an emergency is declared to exist, and this act, being necessary for the immediate preservation of the public peace, health and safety, shall take effect and be in full force from and after the date of its passage and approval."

Acts 1949, No. 349, § 3: Mar. 21, 1949. Emergency clause provided: "The Fifty-Seventh General Assembly of the State of Arkansas hereby finds and declares that many competent citizens, owners of an interest in real property with an incompetent person, have been denied the right to dispose of such interest when it would have been to the best interest of all concerned to do so; that the denial of such sales, even when supervised by a Court of competent jurisdiction, has prohibited the alienation of property and has unduly worked a hardship upon competent persons owning an interest therein; and, accordingly, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety of

the citizens of this State, shall take effect and be in full force from and after the date of its passage and approval."

Acts 1963, No. 518, § 3: Mar. 19, 1963. Emergency clause provided: "It having been found by the General Assembly of the State of Arkansas that the present law regarding payment of attorney's fees in partition suits is not clear, and that procedure in such matters vary from court to court within this state, thereby working an undue hardship on attorneys and petitioners in partition suits, an emergency is hereby declared to exist and this act being necessary for the preservation of public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1983, No. 783, § 4: Mar. 24, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is no statutory law currently in effect describing in particular those services for which an attorney's fee may be awarded in partition actions and that since such fees are assessed against the defendants as well as the plaintiffs interest in the property, such codification is necessary to protect the interest of all parties involved in a partition lawsuit. Therefore, an emergency is declared to exist and this Act, being necessary for the preservation of the public peace, health and safety, shall be in effect from and after its passage and approval."

Acts 2013, No. 1184, § 3: Apr. 12, 2013. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the procedure for selling land in a partition action does not allow a method for listing the property for sale or obtaining the best price for the property through a negotiated sale; that a procedural change to permit more flexibility to obtain the best price for property subject to partition should be authorized for the benefit of owners of real property; and that this act is immediately necessary to provide these benefits to pending and future cases to protect the property rights and interest of owners of real property. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor

vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is

overridden, the date the last house overrides the veto."

Acts 2015, No. 107, § 4: Jan. 1, 2016.

RESEARCH REFERENCES

ALR. Burden of proof as regards alleged prior voluntary partition of property. 1 A.L.R.2d 473.

Partition of land by lot or chance. 32 A.L.R.4th 909.

Am. Jur. 59A Am. Jur. 2d, Partit., § 1 et seq.

Ark. L. Rev. Gift and Estate Tax Consequences of Arkansas Cotenancies, 7 Ark. L. Rev. 237.

Tenancies by Entirety — An Estate Planner's Dilemma (A Study of Unintended Result), 23 Ark. L. Rev. 44.

C.J.S. 68 C.J.S., Partit., § 1 et seq.

U. Ark. Little Rock L.J. Survey of Arkansas Law, Property, 1 U. Ark. Little Rock L.J. 223.

DeSimone, Survey of Property Law, 3 U. Ark. Little Rock L.J. 286.

Note, Property — Future Interests — Partition by Remaindermen Allowed, Henry v. Kennedy, 273 Ark. 383, 619 S.W.2d 632 (1981), 4 U. Ark. Little Rock L.J. 543.

18-60-401. Petition — Determination of heirs property — Applicability.

(a) Under this subchapter, any persons having any interest in and desiring a division of land held in joint tenancy, in common, as assigned or unassigned dower, as assigned or unassigned curtesy, or in coparceny, absolutely or subject to the life estate of another, or otherwise, or under an estate by the entirety when the owners have been divorced, except when the property involved is a homestead and occupied by either of the divorced persons, shall file in the circuit court a written petition.

(b)(1) The petition shall contain:

(A) The description of the property;

(B) The names of each party having an interest in the property and the nature and amount of the interest; and

(C) A prayer for:

(i) The division and for a sale of the property if it appears that partition cannot be made without great prejudice to the owners; and

(ii) Any other appropriate relief.

(2) All persons interested in the property who have not united in the petition shall be summoned to appear.

(c)(1) The court shall determine whether or not the property is heirs property as defined in § 18-60-1002.

(2) If the court determines after notice and hearing or otherwise that the property is heirs property, the Uniform Partition of Heirs Property Act, § 18-60-1001 et seq., shall, unless all of the cotenants otherwise agree in a record as defined by § 18-60-1002:

(A) Apply to the partition of the property; and

(B) To the extent of any conflict between this subchapter and the Uniform Partition of Heirs Property Act, § 18-60-1001 et seq., govern the procedures and rights of the parties concerning the heirs property.

History. Rev. Stat., ch. 107, § 1; Civil Code, § 538; C. & M. Dig., § 8091; Pope's Dig., § 10509; Acts 1941, No. 92, § 1; 1947, No. 161, § 1; 1957, No. 324, § 1; A.S.A. 1947, § 34-1801; Acts 2015, No. 107, § 2.

Amendments. The 2015 amendment

added "Determination of heirs property — Applicability" to the section heading; substituted "subchapter" for "act" in (a); rewrote (b)(1); and added (c).

Effective Dates. Acts 2015, No. 107, § 4: Jan. 1, 2016.

RESEARCH REFERENCES

ALR. Homestead Right of Cotenant as Affecting Partition. 83 A.L.R.6th 605.

Ark. L. Rev. Acts of 1947: Partition of Estates by Entirety, 1 Ark. L. Rev. 220.

Case Notes — Oil and Gas — Petition — Interest of Lessee, 11 Ark. L. Rev. 186.

CASE NOTES

ANALYSIS

Constitutionality.
Applicability.
Attorney's Fees.
Cotenants.
Creditor's Rights.
Dower and Curtesy.
Estates by Entirety.
Estoppel.
Expenses.
Finality.
Homestead.
Improvements.
Jurisdiction.
Life Estate.
Partition in Kind.
Remainderman.
Rents and Profits.
Sale.

Constitutionality.

Where there was no allegation or evidence produced that the defendants had not had sufficient notice or were discriminated against because of their race or otherwise, application of this section was not unconstitutional. *McNeely v. Bone*, 287 Ark. 339, 698 S.W.2d 512 (1985).

Trial court erred in refusing to set aside a confirmation of a judicial sale of land held by the grandsons to satisfy an attorney's lien for representation of one grandson; the grandson was not afforded due

process before his interest in the property was ordered to be sold, §§ 18-60-401 and -403, and the attorney's lien rendered the order void as to him. *Williams v. Hall*, 98 Ark. App. 90, 250 S.W.3d 581 (2007).

Applicability.

This section did not apply to the partition of a leasehold working agreement. *Pasteur v. Niswanger*, 226 Ark. 486, 290 S.W.2d 852 (1956).

Section 18-60-213 applies to tenants in common involved in ejectment and trespass actions, and does not apply to tenants in common involved with a partition suit which is governed by this section. *Graham v. Inlow*, 302 Ark. 414, 790 S.W.2d 428 (1990).

Attorney's Fees.

Where the owners of an undivided interest in oil, gas, and mineral leases to certain land conveyed a smaller undivided fraction of the leases to attorneys at law to represent them in litigation concerning such leases, the clients had a right upon petition to a partition of that interest. *Schnitt v. McKellar*, 244 Ark. 377, 427 S.W.2d 202 (1968).

Cotenants.

Lands cannot be partitioned if the lands are adversely held, or the title to the lands is in dispute, unless the lands are vacant and not in actual possession. Where the

cotenant has been ousted, or his rights totally denied by his cotenant, his remedy is by ejectment, in which he may recover his just proportion of the land, and also of the rents and profits. *London v. Overby*, 40 Ark. 155 (1882).

A party claiming legal title cannot maintain partition with cotenant while his interests are adversely held by others. His title must first be established at law. *Moore v. Gordon*, 44 Ark. 334 (1884).

Ejectment is the only remedy for a tenant in common who is not in actual possession and whose title is denied by his cotenants. *Criscoe v. Hambrick*, 47 Ark. 235, 1 S.W. 150 (1886).

Where appellants failed to identify the precise interests held in the property they were seeking to divide, a grant of a partition under this section would not only have been improper, but would have been impossible. *Trice v. Trice*, 91 Ark. App. 309, 210 S.W.3d 147 (2005).

Creditor's Rights.

A third party may execute against a spouse's interest in a tenancy by the entirety, subject to the other spouse's continued rights of possession and survivorship, and interest in one-half of the rents and profits. *Morris v. Solesbee*, 48 Ark. App. 123, 892 S.W.2d 281 (1995).

Dower and Curtesy.

One with a dower right only in real property has a sufficient interest to sue for partition against the remaindermen. *Smith v. Smith*, 235 Ark. 932, 362 S.W.2d 719 (1962), overruled on other grounds, *Bell v. Wilson*, 298 Ark. 415, 768 S.W.2d 23 (1989); *Gibson v. Gibson*, 264 Ark. 418, 572 S.W.2d 146 (1978).

Under this section, a widow having an unassigned dower interest in land could maintain the partition suit she had filed against the grandson, a minor, who held his undivided one-half interest in fee. *Smith v. Smith*, 235 Ark. 932, 362 S.W.2d 719 (1962), overruled on other grounds, *Bell v. Wilson*, 298 Ark. 415, 768 S.W.2d 23 (1989).

The exercise of jurisdiction of the chancery court under this section is not prevented by the widow's unassigned dower. *Doss v. Taylor*, 244 Ark. 252, 424 S.W.2d 541 (1968).

Estates by Entirety.

The 1947 amendment operated prospectively as regards entirety estates and

could not affect those created prior to the effective date of the act; therefore, if an entirety estate created prior to 1947 could not be divided against the wishes of one tenant in divorce proceedings, the entirety estate could not be partitioned against the wishes of one tenant in a partition proceeding. *Brown v. Brown*, 233 Ark. 422, 345 S.W.2d 27 (1961).

Where an estate by the entirety could not be divided by the court prior to the enactment of § 9-12-317, one of the owners could not claim adverse possession where the other owner quit living on the property following the divorce of the owners by the entirety. *Hubbard v. Hubbard*, 251 Ark. 465, 472 S.W.2d 937 (1971).

This section requires that tenants by the entirety be validly divorced. *Stewart v. Stewart*, 16 Ark. App. 164, 698 S.W.2d 516 (1985).

Noticeably absent from this section is the right to partition an estate by the entirety where the tenants are still married; an estate by the entirety, which is peculiar to marriage, entails the right of survivorship, and such right can be dissolved only in a divorce proceeding, by death, or by the voluntary action of both parties. *Lowe v. Morrison*, 289 Ark. 459, 711 S.W.2d 833 (1986).

A third party, who has a money judgment against a husband, cannot force partition and sale of land held by the husband and wife by the entirety. *Lowe v. Morrison*, 289 Ark. 459, 711 S.W.2d 833 (1986).

A third person can obtain a judgment against a husband or wife and that judgment will be a lien against the debtor's interest in the land; however, that claim cannot defeat the interest of the other spouse. *Lowe v. Morrison*, 289 Ark. 459, 711 S.W.2d 833 (1986).

Estoppel.

Party who treated tract of land as his own property estopped himself from claiming an undivided interest in the larger property of which the tract was a part. *Crain v. Foster*, 230 Ark. 190, 322 S.W.2d 443 (1959).

Expenses.

Expenses incurred as to land owned jointly by partners should be settled in a proceeding for partition, and not on bill to settle partnership accounts. *Jones v. Jones*, 23 Ark. 212 (1861).

Finality.

When appellant failed to appeal from the partition order confirming the deed, it became final and protected by the doctrine of *res judicata*. *Magness v. Commerce Bank*, 42 Ark. App. 72, 853 S.W.2d 890 (1993).

Homestead.

A widow's right of homestead is individual and indivisible and can only be divided or sold with her consent. *Henderson v. Henderson*, 212 Ark. 31, 204 S.W.2d 911 (1947).

The homestead right of a widow in real property is not such an interest in the real estate as will support a partition suit under this section. *Gibson v. Gibson*, 264 Ark. 420, 572 S.W.2d 148 (1978).

Homestead exception held to prevent partition of property. *Pascall v. Smith*, 267 Ark. 66, 588 S.W.2d 700 (1979).

Where wife obtained valid Texas divorce, real property held by the couple in Arkansas as tenancy by the entirety should, under § 9-12-317, be converted to a tenancy in common and the proceeds of sale divided equally and husband was not entitled to claim the property as his homestead under this rule even though he occupied it as his home. *Rodgers v. Rodgers*, 271 Ark. 762, 611 S.W.2d 175 (1981).

The homestead exception contained in this section applies only to property held by divorced persons as tenants by the entirety and not to property held as tenants in common. *Padgett v. Haston*, 279 Ark. 367, 651 S.W.2d 460 (1983).

The homestead exception of this section should not be construed to limit the right to partition with respect to each form of tenancy listed in this section, because the express language of the exception refers only to that portion of this section creating a right to partition land held as tenants by the entirety by divorced persons. *Padgett v. Haston*, 279 Ark. 367, 651 S.W.2d 460 (1983).

Improvements.

Improvements made without the assent of cotenants and without promise to contribute to their payment, although not constituting a lien upon the estate, should be taken into consideration in a partition decree. *Drennen's Adm'r v. Walker*, 21 Ark. 539 (1860).

A tenant in common has the right to make improvements on the land without

the consent of his cotenants; and, although he has no lien on the land for the value of his improvements, he will be indemnified for them, in a proceeding in equity to partition the land between himself and cotenants, either by having the part upon which the improvements are located allotted to him or by having compensation for them, if thrown into the common mass, because tenants in common might be improved out of their property; however, the cotenant can only receive the enhancement value of the improvement to the property. *Graham v. Inlow*, 302 Ark. 414, 790 S.W.2d 428 (1990).

Jurisdiction.

The statutory regulations for partition of land do not take away the original jurisdiction of chancery. *Patton v. Wagner*, 19 Ark. 233 (1857).

Where initial action for ejectment or partition was filed in circuit court, but Bank filed its action to quiet title and its foreclosure action in chancery court, the actions could be consolidated in chancery court; although ejectment lies in law, partition may be filed in either law or equity, providing a basis for equitable jurisdiction. *Schwarz v. Colonial Mtg. Co.*, 326 Ark. 455, 931 S.W.2d 763 (1996).

Life Estate.

Where a possessory life estate is owned by a joint tenant or by tenant in common and at least one undivided interest in such land is owned in fee by another joint tenant or tenant in common, then such joint tenant or tenant in common may have partition of the land in which life estate exists, so as to bind the future interest limited after such life estate unless the creator of the life estate directed otherwise. *McGee v. Hatcher*, 217 Ark. 402, 230 S.W.2d 41 (1950).

Partition is available to remaindermen, coparceners, joint tenants, and tenants in common subject to the life estate of another but is not available to a life tenant against the wishes of the remaindermen. *Monroe v. Monroe*, 226 Ark. 805, 294 S.W.2d 338 (1956).

The words "or otherwise" modify and refer to the life estate of another and not to the words "in joint tenancy in common or coparceny" in this section as amended in 1941, so that a life tenant has no right

to partition as against remaindermen. *Monroe v. Monroe*, 226 Ark. 805, 294 S.W.2d 338 (1956).

Although a life tenant does not have the right to obtain a partition as against the remainderman, the life tenant, when he is also a remainderman, could obtain a partition by giving up any claim to the value of his life estate. *Bowman v. Phillips*, 260 Ark. 496, 542 S.W.2d 740 (1976).

One who acquires a life estate by will or deed does not have the same right of partition or commutation as one who holds a life estate in land by virtue of dower or curtesy, and the owner of a life estate created by a will or deed is not denied equal protection of or equal rights under the law because of the different treatment. *Staggs v. Staggs*, 277 Ark. 315, 641 S.W.2d 29 (1982).

Partition in Kind.

Section 18-60-414 and this section confer upon the chancellor the authority to decide whether partition in kind is feasible; that is a question of fact, the answer to which depends on evidence of the nature of the land and the nature of the interests of the owners. *McNeely v. Bone*, 287 Ark. 339, 698 S.W.2d 512 (1985).

Remainderman.

Remainderman is entitled to partition subject to life estate where life tenant is committing waste. *Smith v. Smith*, 219 Ark. 304, 241 S.W.2d 113 (1951).

Under this section, citizens of the State of Arkansas who have an interest in property as remaindermen, whether or not they have any possessory interest, may utilize the power of partition provided in the statute to partition their respective future interests in the subject property which are subject to and do not affect the life estate of another. *Henry v. Kennedy*, 273 Ark. 383, 619 S.W.2d 632 (1981).

Rents and Profits.

When a coparcener has used rents and profits from the common property, in partition, no lien can be declared upon share of such coparcener for such sums. *Clark v. Hershey*, 52 Ark. 473, 12 S.W. 1077 (1889); *Brown v. Bocquin*, 57 Ark. 97, 20 S.W. 813 (1892).

Sale.

After finding that the land was not divisible in kind, and as an appraisal could not be ordered, the court followed the only appropriate option advanced by counsel, a sale. *Webber v. Webber*, 331 Ark. 395, 962 S.W.2d 345 (1998).

Cited: *O'Mary v. Dunn*, 261 Ark. 323, 547 S.W.2d 758 (1977); *Gibson v. Gibson*, 266 Ark. 622, 589 S.W.2d 1 (1979); *Harbour v. Sheffield*, 269 Ark. 932, 601 S.W.2d 595 (Ct. App. 1980); *Canady v. Canady*, 285 Ark. 378, 687 S.W.2d 833 (1985); *Kinthead v. Spillers*, 336 Ark. 60, 983 S.W.2d 425 (1999).

18-60-402. [Repealed.]

Publisher's Notes. This section, concerning no verification required, was repealed by Acts 2013, No. 1464, § 2. The

section was derived from Civil Code, § 548; C. & M. Dig., § 8099; Pope's Dig., § 10519; A.S.A. 1947, § 34-1802.

18-60-403. Parties generally.

(a) Every person having an interest as is specified in § 18-60-401, whether in possession or otherwise, and every person entitled to dower or curtesy in the premises, if it has not been admeasured, shall be made a party to the petition.

(b) In cases in which one (1) or more of the parties, or the share or quantity of interest of any of the parties, is unknown to the petitioner, or uncertain or contingent, or the ownership of the inheritance shall depend upon an executory devise, or the remainder shall be contingent so that the parties cannot be named, it shall be so stated in the petition.

History. Rev. Stat., ch. 107, §§ 3, 4; C. & M. Dig., § 8092; Pope's Dig., §§ 10511, 10512; A.S.A. 1947, §§ 34-1806, 34-1807.

CASE NOTES

ANALYSIS

Constitutionality.
Guardians.

Constitutionality.

Trial court erred in refusing to set aside a confirmation of a judicial sale of land held by the grandsons to satisfy an attorney's lien for representation of one grandson; the grandson was not afforded due process before his interest in the property was ordered to be sold, §§ 18-60-401 and -403, and the attorney's lien rendered the

order void as to him. *Williams v. Hall*, 98 Ark. App. 90, 250 S.W.3d 581 (2007).

Guardians.

A recital in a partition decree that the defendant appeared as guardian justified the presumption on collateral attack that ward who was a necessary party to the suit was properly made a party thereto. *Waldron v. Taenzer*, 79 Ark. 16, 94 S.W. 925 (1906).

Cited: *Kinthead v. Spillers*, 336 Ark. 60, 983 S.W.2d 425 (1999).

18-60-404. [Repealed.]

Publisher's Notes. This section, concerning restriction on the right to partition for certain purchasers of land, was repealed by Acts 2015, No. 107, § 3. This

section was derived from Acts 1985, No. 971, §§ 1, 2; A.S.A. 1947, §§ 34-1839, 34-1840; Acts 1991, No. 759, § 1; 2015, No. 107, § 3.

18-60-405. Guardians for infants or individuals with mental illness.

(a) The statutory guardian of an infant or of an individual with mental illness may file or unite in the petition in the names of, and in conjunction with, the infant or person of unsound mind.

(b)(1) If the petition is filed against infants or individuals with mental illness, the guardian may appear and defend for them and protect their interests.

(2) If the guardian does not, the court shall appoint some discreet person for that purpose.

History. Civil Code, § 540; C. & M. Dig., § 8095; Pope's Dig., § 10515; A.S.A. 1947, § 34-1803.

CASE NOTES

ANALYSIS

Compromise Decrees.
Service on Guardian.

Compromise Decrees.

A compromise decree entered with consent of the guardian but without sanction or investigation by the court was void.

Rankin v. Schofield, 81 Ark. 440, 98 S.W. 674 (1905).

Service on Guardian.

Under this section giving the guardian the right to appear and defend for the minor, the fact that no summons in a partition suit had been served on the minor personally but had been served on

his guardian, where minor appeared and asked for affirmative relief, gave the minor no grounds for complaint. *Smith v. Smith*, 235 Ark. 932, 362 S.W.2d 719 (1962), overruled on other grounds, *Bell v. Wilson*, 298 Ark. 415, 768 S.W.2d 23 (1989).

18-60-406. Court-appointed guardians for minors.

(a) It shall be lawful for the circuit court of the proper county, for any of the purposes intended by § 18-60-401, and before or after any proceedings by virtue thereof, to appoint a guardian for any minor, whether the minor resides in or out of this state. The guardian, for all the purposes of this act, shall have the same powers as any general guardian.

(b) It shall be the duty of any court appointing any guardian for any minor entitled to any moneys arising from the sale in §§ 18-60-420 — 18-60-423 to require of the guardian a bond to the state, with such security as the court shall deem sufficient, conditioned for the faithful discharge of the duty or trust committed to him or her and that he or she will render a just and true account of his or her guardianship in all courts and places when required.

History. Rev. Stat., ch. 107, §§ 36, 37; C. & M. Dig., §§ 8121, 8122; Pope's Dig., §§ 10543, 10544; A.S.A. 1947, §§ 34-1804, 34-1805. 107, as amended, codified as §§ 18-60-401, 18-60-403, 18-60-406, 18-60-408, 18-60-411 — 18-60-416 and 18-60-420 — 18-60-424.

Meaning of "this act". Rev. Stat., ch.

18-60-407. Constructive service.

Parties interested may be constructively summoned as provided by Rule 4 of the Arkansas Rules of Civil Procedure.

History. Civil Code, § 543; C. & M. Dig., § 8098; Pope's Dig., § 10518; A.S.A. 1947, § 34-1808; Acts 2013, No. 1148, § 57. **Amendments.** The 2013 amendment substituted "by Rule 4 of the Arkansas Rules of Civil Procedure" for "§ 16-58-130".

18-60-408. Intervention.

Any person having an interest in the premises sought to be divided or sold, whether the interest is present or future, vested or contingent, though not made a party in the petition may appear and, on showing his or her interest by affidavit to the satisfaction of the court, be made a party to the suit for partition.

History. Rev. Stat., ch. 107, § 9; C. & M. Dig., § 8093; Pope's Dig., § 10513; A.S.A. 1947, § 34-1809.

18-60-409. Court order for division.

Upon a petition by all interested in the property being filed, or upon a summons being served upon all who have an interest in the property, and who have not united in the petition ten (10) days before commencement of the term, the court may make an order for the division according to the rights of the parties, by commissioners appointed according to law.

History. Civil Code, § 539; C. & M. Dig., § 8094; Pope's Dig., § 10514; A.S.A. 1947, § 34-1810.

CASE NOTES**Rights of the Parties.**

The partition statutes require the court to take into consideration the respective

rights and interests of the parties to the action. *Bell v. Wilson*, 298 Ark. 415, 768 S.W.2d 23 (1989).

18-60-410. Answer.

If any person summoned, as provided in §§ 18-60-401, 18-60-405, and 18-60-409, desires to contest the rights of the petitioners or the statements in the petition, he or she shall do so by a written answer, and the questions of law and fact thereupon arising shall be tried and determined by the court.

History. Civil Code, § 541; C. & M. Dig., § 8097; Pope's Dig., § 10517; A.S.A. 1947, § 34-1811.

18-60-411. Entry of default.

If any of the parties duly notified by personal service or publication shall not appear and plead within the time allowed by the court for that purpose, the default shall be entered. The petitioners shall, nevertheless, make out their case by the exhibition to the court of the evidence of their title upon which they claim.

History. Rev. Stat., ch. 107, § 13; C. & M. Dig., § 8096; Pope's Dig., § 10516; A.S.A. 1947, § 34-1812.

CASE NOTES**Proof.**

The failure of defendant to answer does not dispense with the necessity of proof. *Moore v. Willey*, 77 Ark. 317, 91 S.W. 184 (1905).

Cited: *Webber v. Webber*, 331 Ark. 395, 962 S.W.2d 345 (1998).

18-60-412. Judgment.

(a) The court shall ascertain, from the evidence in case of default or from the confession by answer of the parties, if they appear, and shall declare the rights, titles, and interests of all the parties to the proceedings, petitioners as well as defendants, so far as they shall have appeared.

(b) The court shall determine the rights of the parties in the lands and tenements and give judgment that partition be made between such of them as shall have any right therein, in accordance with the right thus ascertained.

History. Rev. Stat., ch. 107, § 14; C. & M. Dig., § 8100; Pope's Dig., § 10520; A.S.A. 1947, § 34-1813.

CASE NOTES

ANALYSIS

Finality.
Notice.
Sale.

Finality.

Where the original decree in a partition suit determined the interests of all the parties involved, it became final with the lapse of the term, and a supplemental decree rendered at a subsequent term changing the interests of the parties but not embracing any of the statutory grounds for vacating or modifying the prior decree and alleging no claims that the original decree was procured by fraud was held void. Ingram v. Wood, 172 Ark. 226, 288 S.W. 393 (1926).

Notice.

An order appointing commissioners to divide land without petition and without notice to the parties interested was void; and a mere confirmation of the commissioners' report by the court without decree of title or deed by the commissioners does not vest a legal title. Harris v. Preston, 10 Ark. 201 (1849).

Sale.

After finding that the land was not divisible in kind, and as an appraisal could not be ordered, the court followed the only appropriate option advanced by counsel, a sale. Webber v. Webber, 331 Ark. 395, 962 S.W.2d 345 (1998).

18-60-413. No partition contrary to terms of will.

No partition or sale of land, tenements, or hereditaments devised by any last will and testament shall be made, under the provisions of this act, contrary to the intention of any testator as expressed in his or her last will and testament.

History. Rev. Stat., ch. 107, § 34; C. & M. Dig., § 8090; Pope's Dig., § 10508; A.S.A. 1947, § 34-1814.

Meaning of "this act". See note to § 18-60-406.

CASE NOTES

Partition Not Found.

Trial court properly dismissed the grandchildren's complaint to set aside a sale and cancel a deed conveying the chil-

dren's 8/9 interest in the subject property because the restriction on the right of alienability in the testator's will was given to, and was personal to, her surviving

children, the conveyance of the children's undivided interest was not a partition of the property, and setting aside the deed would not benefit the grandchildren since they would have the same collective 1/9

interest in the property regardless of the outcome of the litigation. *Graham v. French*, 2015 Ark. App. 29, 454 S.W.3d 246 (2015).

18-60-414. Appointment of commissioners.

(a)(1) Whenever any judgment of partition shall be rendered, the court may, by rule or order, appoint not fewer than three (3) nor more than five (5) commissioners who are residents of the county in which the premises to be divided is situated to make the partition so adjudged, according to the respective rights and interests of the parties, as they were ascertained and determined by the court.

(2) On such rule or order, the court shall designate the part or shares which shall remain undivided, if any, for the owners whose interest shall be unknown and not ascertained.

(b) In case of death, resignation, neglect, or refusal to act of any of the commissioners to be appointed as aforesaid, before the duties, trust, and services required of them shall be completed, the court, or judge thereof in vacation, may appoint another commissioner, who shall be vested with the like powers and authority as if he or she had been originally appointed.

History. Rev. Stat., ch. 107, §§ 16, 38; §§ 10521, 10522; Acts 1983, No. 503, § 1; C. & M. Dig., §§ 8101, 8102; Pope's Dig., A.S.A. 1947, §§ 34-1815, 34-1816.

CASE NOTES

ANALYSIS

Construction.
Partitions in Kind.

Construction.

The use of the word "may" rather than "shall" in this section suggests that the deployment of commissioners is permissive. *Bell v. Wilson*, 298 Ark. 415, 768 S.W.2d 23 (1989).

Partitions in Kind.

Section 18-60-401 and this section confer upon the chancellor the authority to decide whether partition in kind is feasible; that is a question of fact, the answer to which depends on evidence of the nature of the land and the nature of the interests of the owners. *McNeely v. Bone*, 287 Ark. 339, 698 S.W.2d 512 (1985).

Cited: *O'Mary v. Dunn*, 261 Ark. 323, 547 S.W.2d 758 (1977).

18-60-415. Duties of commissioners.

(a)(1) The commissioners shall immediately proceed to make partition, according to the judgment of the court, unless it shall appear to them, or a majority of them, that partition of the premises cannot be made without great prejudice to the owners.

(2) In such a case they shall make report of this fact in court, under their hands, accompanied by an affidavit of the truth of the fact stated in the report so returned.

(b)(1) In making partition, the commissioners shall divide the lands and tenements, and allot the several portions and shares thereof to the respective parties, quality and quantity relatively being considered by

them according to the respective rights and interests of the parties, so adjudged by the court, designating the several shares and portions by metes and bounds.

(2) The commissioners may, when necessary, employ a surveyor and assistants to assist them.

(c)(1) The commissioners shall make a full and detailed report of their proceedings, in writing, signed by them, or a majority of them, specifying therein the manner of executing the trust.

(2)(A) The report shall describe the lands divided and the shares allotted to each party, with the quantity of each share, the boundaries, courses, and distances, together with any other facts necessary for a complete elucidation of the division.

(B) This report shall be accompanied by the affidavits of the commissioners as may sign the report, verifying the facts set forth therein.

History. Rev. Stat., ch. 107, §§ 17-19; §§ 10523-10525; A.S.A. 1947, §§ 34-1817 C. & M. Dig., §§ 8103-8105; Pope's Dig., — 34-1819.

CASE NOTES

ANALYSIS

Applicability.
Report.

Applicability.

This section does not apply to proceedings for the assignment of dower. *Crosser v. Crosser*, 121 Ark. 64, 180 S.W. 337 (1915).

Report.

When commissioners decide that partition cannot be made without great preju-

dice to the owners, the report should show the facts upon which they base such an opinion, so that the court may determine whether or not it is well founded. *McGee v. Russell*, 49 Ark. 104, 4 S.W. 284 (1886).

Cited: *McCarley v. Carter*, 187 Ark. 282, 59 S.W.2d 596 (1933); *Newton v. American Sec. Co.*, 201 Ark. 943, 148 S.W.2d 311 (1941); *McNeely v. Bone*, 287 Ark. 339, 698 S.W.2d 512 (1985).

18-60-416. Court action on commissioners' report.

(a) Upon a report of the divisions by the commissioners appointed for that purpose being returned, the court may confirm or set aside the report or remand it to the commissioners for correction.

(b) Upon good cause shown by either party, on the report being made and returned to the circuit court, it may be set aside by the court, who may appoint new commissioners, who shall proceed in like manner as directed in § 18-60-415. The court shall not set aside a second report for the same cause for which the first report was set aside.

(c)(1) If no cause is shown, the report shall be confirmed, and judgment shall thereupon be given that the partition be firm and effectual forever.

(2) The judgment shall be binding and conclusive on all the parties to the proceedings, their representatives, and all other persons claiming

under them by right derived after the commencement of the proceedings.

History. Civil Code, § 545; Rev. Stat., 8108; Pope's Dig., §§ 10526-10528; A.S.A. ch. 107, §§ 20, 21; C. & M. Dig., §§ 8106-1947, §§ 34-1820 — 34-1822.

CASE NOTES

ANALYSIS

Finality of Report.
Report Advisory.

Finality of Report.

In light of subsection (c), an initial order of partition is not final so as to bind the parties and be conclusive of their rights. *Looney v. Looney*, 336 Ark. 542, 986 S.W.2d 858 (1999).

Report Advisory.

Where partition is by equitable proceeding, the court may appoint commissioners,

but their report as to the necessity of sale for partition or as to the possibility of partition in kind is advisory merely and not binding on the court. *McGehee v. Oxner*, 150 Ark. 618, 234 S.W. 989 (1921).

Cited: *Crain v. Foster*, 230 Ark. 190, 322 S.W.2d 443 (1959); *Kinhead v. Spillers*, 327 Ark. 552, 940 S.W.2d 437 (1997).

18-60-417. Deeds of partition.

On the confirmation of the report of the division of lands, the commissioners, or some commissioner appointed for the purpose, shall make a deed or deeds of partition, conveying to each party the land allotted to him or her in severalty, which shall be approved by the court and recorded as other deeds.

History. Civil Code, § 546; C. & M. Dig., § 8109; Pope's Dig., § 10529; A.S.A. 1947, § 34-1823.

CASE NOTES

Cited: *Kinhead v. Spillers*, 327 Ark. 552, 940 S.W.2d 437 (1997).

18-60-418. Costs.

The costs of the division shall be apportioned among the parties in the ratio of their interests, and the costs arising from any contest of fact or law shall be paid by the party adjudged to be in the wrong.

History. Civil Code, § 547; C. & M. Dig., § 8110; Pope's Dig., § 10530; A.S.A. 1947, § 34-1824.

CASE NOTES

ANALYSIS

Discretion.
Sale.

Discretion.

The matter of taxation of costs in chan-
cery cases is within the discretion of the
chancellor and unless there is an arbi-

trary abuse of power on his part, the
award will not be disturbed. *Wilson v.*
Wilson, 211 Ark. 1030, 204 S.W.2d 479
(1947).

Sale.

A sale cannot be made to pay costs.
Cowling v. Nelson, 76 Ark. 146, 88 S.W.
913 (1905).

18-60-419. Attorney's fees.

(a)(1) In all suits in any of the courts of this state for partition of
lands when a judgment is rendered for partition in kind, or a sale and
a partition of the proceeds, the court rendering the judgment or decree
shall allow a reasonable fee to the attorney bringing the suit.

(2) The attorney's fee shall be taxed as part of the costs in the cause
and shall be paid pro rata as the other costs are paid according to the
respective interests of the parties to the suit in the lands so partitioned.

(b)(1) When judgment is rendered by a court of this state for
partition of realty in kind, or for the sale of realty and partition of the
proceeds of the sale, the court in assessing a reasonable fee to be
allowed the attorney bringing the action shall consider only those
services performed by the attorney requesting a fee which are of
common benefit to all parties.

(2) The court shall assess no fee for services which benefit only one
(1) party, such as services necessary for the preparation and trial of
contested issues of title or services for which payment has been made by
the agreement of the parties.

(c) In no event shall a fee so assessed and taxed as costs exceed forty
thousand dollars (\$40,000) in total compensation and costs.

(d) In no event shall a fee be awarded when the trial court shall
determine that the attorney seeking the allowance of a fee has an
interest in the subject matter property.

(e) Subsections (b)-(d) of this section shall not be construed as
limiting the amount of any fee charged by an attorney to the attorney's
client.

History. Acts 1921, No. 386, § 1; Pope's 1983, No. 783, §§ 1, 2; A.S.A. 1947, §§ 34-
Dig., § 10531; Acts 1963, No. 518, § 1; 1825 — 34-1825.2.

CASE NOTES

ANALYSIS

Constitutionality.
Amount.
Entitlement.
Nature of Proceeding.

Taxation as Costs.

Constitutionality.

This section is not violative of the due
process clause of the 14th Amendment nor
any other provision of the U.S. Constitu-
tion. *Cole v. Scott*, 264 Ark. 800, 575

S.W.2d 149 (1979).

Amount.

Where a lawyer is entitled to an attorney's fee because he files a petition and partition is granted, the fee should be set carefully by the court after deliberation and then only for an amount that is fair and justified. *Swinson v. Jarratt*, 265 Ark. 242, 578 S.W.2d 197 (1979).

There is no fixed formula in partition actions, unlike probate proceedings, to be applied in the determination of an attorney's fee, and the amount of the fee awarded is within the broad discretion of the trial court, although it must not be abused. *Padgett v. Haston*, 279 Ark. 367, 651 S.W.2d 460 (1983).

An award of attorney's fees based on a percentage of the total sales price of partitioned property is not per se unreasonable. *Rahat v. Golmirzaie*, 332 Ark. 569, 966 S.W.2d 883 (1998).

Entitlement.

The chancery court properly refused to tax against the defendant's interest any portion of the fee of the successful attorney in a partition suit where the court ordered the sale of the property. *Warren v. Klappenbach*, 213 Ark. 227, 209 S.W.2d 468 (1948).

Where plaintiff filed a petition to quiet title, defendant counterclaimed for partition, and plaintiff filed an amended complaint asking for partition, plaintiff's attorney was allowed the fee as the first one bringing suit for partition since the amended complaint superseded the previous pleadings and was the one on which the decree was rendered. *McElhaney v. Cox*, 257 Ark. 934, 521 S.W.2d 66 (1975).

Arkansas law does not permit an attorney to receive an attorney's fee when he is also a petitioner in a partition suit. *Swinson v. Jarratt*, 265 Ark. 242, 578 S.W.2d 197 (1979).

Where plaintiff brought a successful partition suit which resulted in the selling of the farm and the dividing of the proceeds along with an accounting for the proper rents and profits offset by the reimbursement allowed for improvements between the four cotenants, chancellor properly awarded an attorney's fee to the plaintiff's attorney for services performed for the benefit of all cotenants. *Graham v. Inlow*, 302 Ark. 414, 790 S.W.2d 428 (1990).

The trial court did not abuse its discretion in awarding attorney's fees of 5 percent of the total sales price of three partitioned parcels since both parties to the action benefited from the partition of the land and it was of no consequence that one party incurred more debt after the sale when they chose to purchase two of the three parcels. *Rahat v. Golmirzaie*, 332 Ark. 569, 966 S.W.2d 883 (1998).

Nature of Proceeding.

If a partition was a mere incident to a suit to cancel deeds and establish a trust, attorney's fees under this section were properly disallowed. *McHenry v. McHenry*, 209 Ark. 977, 193 S.W.2d 321 (1946) (decision prior to 1963 amendment).

Where the proceedings are not adversary, a reasonable attorney's fee for plaintiff's attorney should be assessed as costs against all the parties, and an answer which only raises the question as to such fee does not make the suit adversary. *Ramey v. Bass*, 210 Ark. 1097, 198 S.W.2d 835 (1947) (decision prior to 1963 amendment).

Prior to the 1963 amendment, this section was not applicable in an adversary proceeding. *Hendrickson v. Duncan*, 236 Ark. 722, 370 S.W.2d 131 (1963).

Where the parties stipulated their respective interests in the subject land and the only issues were the susceptibility of the land to division and attorney's fees, the proceeding was not adversary and it was proper to allow a fee to plaintiff's attorney. *Guynn v. Guynn*, 237 Ark. 668, 375 S.W.2d 656 (1964) (decision prior to 1963 amendment).

The appointment of a guardian ad litem for the incompetent defendant and the filing of formal pleadings and insisting upon strict proof of the issues by such guardian did not render the proceeding adversary and so preclude the allowance of a fee to plaintiff's attorney. *Guynn v. Guynn*, 237 Ark. 668, 375 S.W.2d 656 (1964) (decision prior to 1963 amendment).

The adversary nature of partition suits is no bar to the allowance of attorney's fees for the services of the attorney bringing the suit and failure or refusal to allow such fees is error. *Johnston Smith*, 248 Ark. 929, 454 S.W.2d 649 (1970).

Where a case was essentially a partition suit, there was no error in awarding the attorney's fees and deducting it from the proceeds of the sale. *Crouch v. Crouch*, 251 Ark. 1047, 476 S.W.2d 248 (1972).

Taxation as Costs.

The attorney's fee should be assessed and taxed proportionately against all parties. *McElhaney v. Cox*, 257 Ark. 934, 521 S.W.2d 66 (1975).

A cotenant was not entitled to have an attorney's fee taxed as costs in the action

where the matter was not raised with the chancellor at or after the trial and there was no evidence of any services which were of common benefit to all parties having been performed by the cotenant's attorney. *Beshear v. Ahrens*, 289 Ark. 57, 709 S.W.2d 60 (1986).

Cited: *Reagan v. Rivers*, 233 Ark. 518, 345 S.W.2d 601 (1961); *Rodgers v. Rodgers*, 271 Ark. 762, 611 S.W.2d 175 (1981); *Hopper v. Daniel*, 72 Ark. App. 344, 38 S.W.3d 370 (2001); *Hearne v. Banks*, 2009 Ark. App. 590, 376 S.W.3d 444 (2009).

18-60-420. Sale of land not susceptible to division.

(a) If the commissioners appointed under this subchapter report to the court that all or part of the land or tenements of which partition had been directed are so situated that partition cannot be made without great prejudice to the owners of the land or tenements, the court may, if satisfied that the report is just and correct, make an order that the commissioners sell all or part of the land or tenements:

- (1) At public auction to the highest bidder; or
- (2) By a negotiated sale under terms and conditions established by the court, including without limitation by engaging a licensed real estate broker to sell the land or tenements.

(b) The court making the order of sale shall therein direct the terms and conditions, time and place of sale, the credit, if any, and the security to be taken.

(c) The commissioners shall give notice of the time and place and terms of any sale to be made by them, in accordance with the order of the court directing the sale.

(d)(1) If the premises consist of distinct farms, buildings, tracts, or lots of land, they shall be sold separately.

(2) When any tract of land or lot can be divided for the purpose of sale, with advantage to the parties interested, it may be so divided and sold in parcels.

History. Rev. Stat., ch. 107, §§ 23-26; C. & M. Dig., §§ 8111-8114; Pope's Dig., §§ 10532-10535; A.S.A. 1947, §§ 34-1826 — 34-1829; Acts 2013, No. 1184, § 2.

A.C.R.C. Notes. Acts 2013, No. 1184, § 1, provided: "Findings and intent.

"(a) The General Assembly finds that:
 "(1) Current law concerning partition actions is susceptible of an interpretation that all partition sales are required to be conducted at public auction;

"(2) Requiring all partition sales to be conducted at public auction may be contrary to the interests of the property owners in some circumstances;

"(3) The interest of affected property owners may be better served by permitting courts to order a negotiated sale of property that is being partitioned; and

"(4) Permitting courts additional flexibility to order the best manner for conducting a partition sale is a procedural change that should be implemented immediately.

"(b) It is the intent of this act to allow a court in a partition action to:

"(1) Order the sale of all or part of the property to be sold by a negotiated sale;

"(2) Establish the terms and conditions of the negotiated sale; and

"(3) To permit the change in the procedure for selling property in a partition action authorized by this act to apply to cases filed after the effective date of this act."

Amendments. The 2013 amendment added (a)(2) and the (1) designation; and, in the introductory language of (a), substi-

tuted "under this subchapter" for "shall", inserted "all or part of", deleted "or that any lot or portion thereof is so situated" preceding "that partition", deleted "thereof" preceding "cannot", substituted "of the land or tenements" for "thereof", and substituted "all or part of the land or tenements" for "the premises so situated".

CASE NOTES

ANALYSIS

Grounds.

Manner of Sale.

Oil and Gas Leases.

Grounds.

This section does not authorize a sale of land involved in a partition suit merely to pay the costs. *Cowling v. Nelson*, 76 Ark. 146, 88 S.W. 913 (1905).

A finding that a sale is necessary should be based upon the consent of parties, on the report of commissioners, or on evidence heard by the chancellor. *Moore v. Willey*, 77 Ark. 317, 91 S.W. 184 (1905).

Where two intersecting "runways" had little value except as airplane landing strips but could not, as a practical matter, be utilized for an airport except as a unit, equity required a partition of the realty by sale, rather than partition in kind. *Geary v. Kirksey*, 234 Ark. 325, 351 S.W.2d 846 (1961).

Manner of Sale.

Parties to partition proceeding could not object to sale of five apartment build-

ings in bulk where decree did not provide for sale alternatively as a whole and in parcels where court had jurisdiction of parties and subject matter and purchaser had paid amount of sale price. *Hadfield v. Kitzmann*, 223 Ark. 459, 266 S.W.2d 801 (1954).

Even though this section contemplates that the sale be made by three commissioners, at least when they recommend a sale, the court would not reverse a decree merely because the circuit clerk was appointed as the commissioner to conduct the sale. *Best v. Williams*, 263 Ark. 444, 566 S.W.2d 133 (1978).

Oil and Gas Leases.

This section is incorporated by reference in the statute pertaining to partition of oil and gas leasehold interest and it gives the court power to order a sale for cash or on credit, as the court may determine. *Overton v. Porterfield*, 206 Ark. 784, 177 S.W.2d 735 (1944).

Cited: *Van Landingham v. Cruce*, 152 Ark. 562, 239 S.W. 25 (1922).

18-60-421. Commissioners or other interested parties not to purchase.

(a)(1) No commissioner nor any person for his or her benefit shall purchase or be directly or indirectly interested in the purchase of any of the premises sold.

(2) No guardian of any minor or person of unsound mind party to the proceedings shall purchase or be interested in the purchase of any of the lands the subject of the proceedings except for the benefit or in behalf of his or her ward.

(b) All sales contrary to the provisions of this section shall be void.

History. Rev. Stat., ch. 107, § 27; C. & M. Dig., § 8115; Pope's Dig., § 10536; A.S.A. 1947, § 34-1830.

CASE NOTES

ANALYSIS

Conflict of Interest.
Guardians.

Conflict of Interest.

A commissioner is a trustee and it is his duty and obligation not only to avoid, in every way, participating in the purchase of property, the sale of which is under his supervision, but also to report to the court any possible conflict of interest. *Swinson v. Jarratt*, 265 Ark. 242, 578 S.W.2d 197 (1979).

Guardians.

A guardian ad litem of infant defendants in a partition suit may not purchase the interest of such defendants. *McLaughlin v. Morris*, 150 Ark. 347, 234 S.W. 259 (1921).

Where the purchaser at a partition sale had a previous agreement with the guardian of an interested minor heir to let him have a half interest in the land, the sale was voidable. *Van Landingham v. Cruce*, 152 Ark. 562, 239 S.W. 25 (1922).

18-60-422. Report and confirmation of sale — Conveyances.

(a) After completing the sale, the commissioners shall report their proceedings to the court, on their oath, with a description of the different parcels of the land sold, the name of the purchaser, and the price bid by him or her, and the report shall be filed in the court.

(b) If the sale is approved and confirmed by the court, an order shall be entered, directing the commissioners, or a majority of them, to execute conveyances pursuant to the sale, and the commissioners shall execute the conveyances accordingly.

(c) The conveyances so executed shall be acknowledged or proven and recorded in the same manner as other conveyances of lands, and shall be a bar, both in law and equity, against all persons interested in the premises who shall have been parties to the proceedings and against all other persons claiming from or under the parties, or either of them, by title derived after suit commenced.

History. Rev. Stat., ch. 107, §§ 28-30, §§ 10537-10539, A.S.A. 1947, §§ 34-1831 C. & M. Dig., §§ 8116-8118; Pope's Dig., — 34-1833.

CASE NOTES

Partition sale is not complete until confirmed by the court and court had power to disapprove sale, even though term of court had expired. *Brown v. Mitchell*, 228 Ark. 106, 305 S.W.2d 854 (1957).

Cited: *Kinthead v. Spillers*, 327 Ark. 552, 940 S.W.2d 437 (1997).

18-60-423. Distribution of sale proceeds.

The proceeds of every sale, after deducting the costs and expenses of the proceedings, shall be divided among the parties whose rights and interests shall have been sold, in proportion to their respective rights in the premises, and shall be paid to them, their guardians, or legal representatives by the commissioners.

History. Rev. Stat., ch. 107, § 31; C. & M. Dig., § 8119; Pope's Dig., § 10540; A.S.A. 1947, § 34-1834.

tenants, payment of tax and penalties from proceeds of sale, § 26-35-303.

Cross References. Land held by joint

Life interests and remainders, determination of present value, § 18-2-101 et seq.

RESEARCH REFERENCES

Ark. L. Rev. Valuation of Life and Remainder Interests in Property, 5 Ark. L. Rev. 373.

18-60-424. Sale without commissioners.

The court may order a sale without the appointment of commissioners if the court determines from the evidence presented that there is no necessity for the appointment of commissioners.

History. Rev. Stat., ch. 107, § 16; Acts 1983, No. 503, § 1; A.S.A. 1947, § 34-1815.

CASE NOTES

Cited: O'Mary v. Dunn, 261 Ark. 323, 547 S.W.2d 758 (1977).

18-60-425. Sale of improved land where infant or individual with mental illness coparcener, etc.

(a) When town or city lots, or land outside of a town or city, but having upon it a building of more value than the land, shall be held by, or in trust, for coparceners, joint tenants, or tenants in common, some of whom are infants or persons of unsound mind, the circuit court, or other court of similar jurisdiction, may, upon the complaint of a part of the owners against the others, of the trustee against the owner, or of the owners against the trustee, and upon its being proved that a division of the land would materially impair its value, order a sale thereof and the division of the proceeds among those entitled.

(b)(1) Before the sale is ordered, the court shall appoint some suitable persons to take care of the interests of the infants or individuals with mental illness.

(2) The shares of the infants or individuals with mental illness shall not be paid by the purchaser, but remain a lien upon the land, bearing interest, until they become capable in law of receiving their respective shares or until statutory guardians shall be appointed for the infants or individuals with mental illness, or the infants shall become married.

(3) The guardians shall give bond as required by law.

History. Civil Code, § 535; C. & M. Dig., § 8124; Pope's Dig., § 10546; A.S.A. 1947, § 34-1836.

Cross References. Guardians generally, § 28-65-101 et seq.

CASE NOTES

Presumptions.

In the absence of a showing to the contrary, in a sale of lands of minors on partition, it will be presumed that the court made all proper orders for the pro-

tection of minors according to law, in ordering the sale of land for partition. *Green v. Holzer*, 118 Ark. 533, 177 S.W. 903 (1915).

18-60-426. Sale of land held jointly or otherwise by incompetent person.

(a) The land of an incompetent person held jointly or otherwise, by survivorship, entirety, tenancy in common, joint tenancy, or howsoever held, with another or others, though not necessary for the payments of debts or maintenance, may be sold by order of the probate division of circuit court having jurisdiction over the land or guardian of the person when it shall appear to the court from legal evidence that the interest of the other owner or owners would be advanced thereby and that the interest of the incompetent person would not be injuriously affected.

(b) The sale of the interest and the disposition of the proceeds derived therefrom shall be controlled in the same manner as provided by law in sales by guardians of real property wherein their wards have an interest.

(c) It is the specific intent of this section to enable guardians, regardless of their wards' interest in real property, technical estate by which held, or the relationship to the ward, to sell the interest of the ward in the property subject to the provisions of subsection (a) of this section.

History. Civil Code, § 534; C. & M. 10545; Acts 1949, No. 349, §§ 1, 2; A.S.A. Dig., §§ 5870, 8123; Pope's Dig., §§ 7587, 1947, §§ 34-1835, 34-1835n.

CASE NOTES

ANALYSIS

Applicability.
Collateral Attack.
Creditor's Rights.

Applicability.

This section does not apply to home-steads. *Penney v. Vessells*, 221 Ark. 389, 253 S.W.2d 968 (1952).

Collateral Attack.

Order of the probate court directing the sale of an insane adult's property interest which met requirements of act rendering

judgments of the probate court in guardian and administrator's sale conclusive was held impervious to collateral attack in the absence of fraud or duress. *Tuchfeld v. Hamilton*, 203 Ark. 428, 156 S.W.2d 887 (1941).

Creditor's Rights.

A third party may execute against a spouse's interest in a tenancy by the entirety, subject to the other spouse's continued rights of possession and survivorship, and interest in one-half of the rents and profits. *Morris v. Solesbee*, 48 Ark. App. 123, 892 S.W.2d 281 (1995).

SUBCHAPTER 5 — QUIETING TITLE GENERALLY

SECTION.	SECTION.
18-60-501. Proceedings generally.	18-60-506. Prima facie title.
18-60-502. Petition.	18-60-507. Lost or destroyed title papers.
18-60-503. Publication of notice — Cancellation of liens.	18-60-508. Decree — Effect.
18-60-504. Adjudication of rights.	18-60-509. Recording of decree.
18-60-505. Proof.	18-60-510. Setting aside decree.
	18-60-511. Costs.

Cross References. Statutes of limitations, § 18-61-101 et seq. Acts 1927, No. 64, § 2: effective 90 days after passage and approval. Approved Mar. 3, 1927.

Effective Dates. Acts 1899, No. 79, § 13: effective on passage.

RESEARCH REFERENCES

Am. Jur. 65 Am. Jur. 2d, Quiet T., § 1 et seq. **C.J.S.** 74 C.J.S., Quiet T., § 1 et seq.

Ark. L. Rev. Bills to Remove Cloud on Title and Quieting Title, 6 Ark. L. Rev. 83.

CASE NOTES

Applicability. This subchapter relates to confirmation of titles not otherwise specifically provided for and does not repeal laws concerning the confirmation of tax titles. Ex parte Morrison, 69 Ark. 517, 64 S.W. 270 (1901).

Cited: Brown v. Minor, 305 Ark. 556, 810 S.W.2d 334 (1991).

18-60-501. Proceedings generally.

Any person claiming to own land that is wild or improved or land that is in the actual possession of himself or herself, or those claiming under him or her, may have his or her title to the land confirmed and quieted by proceeding in the manner provided in this subchapter.

History. Acts 1899, No. 79, § 1, p. 133; C. & M. Dig., § 8362; Pope's Dig., § 10958; A.S.A. 1947, § 34-1901.

CASE NOTES

ANALYSIS	Jurisdiction.
Applicability.	Notice of Conveyances.
Attack on Decree.	Pleading.
Bond.	Possession.
Color of Title.	—Adverse.
	—Constructive.

Applicability.

This section may apply to improved lands which have been permitted to return to a state of nature. *Moore v. Morris*, 118 Ark. 516, 177 S.W. 6 (1915).

Attack on Decree.

Title confirmed in proceedings under this section is not subject to collateral attack. *Kulbeth v. Drew County Timber Co.*, 125 Ark. 291, 188 S.W. 810 (1916).

A confirmation decree rendered pursuant to this section is immune from collateral attack, except for jurisdictional defects apparent on the face of the record. *Buckhannan v. Nash*, 216 F. Supp. 843 (E.D. Ark. 1963).

A confirmation rendered pursuant to this section may be attacked directly on any meritorious ground by the filing of a petition in the original proceeding within the period provided by § 18-60-510 or by a plenary suit having for its specific purpose the setting aside of the decree for fundamental errors such as fraud or lack of jurisdiction, which would render the decree void ab initio. *Buckhannan v. Nash*, 216 F. Supp. 843 (E.D. Ark. 1963).

Action to set aside and vacate decree of confirmation of title brought by claimants who had not been made parties defendant to quiet title action was a direct attack on the decree, not an impermissible collateral attack. *Hall v. Blanford*, 254 Ark. 590, 494 S.W.2d 714 (1973).

Bond.

Bond is not necessary. *Champion v. Williams*, 165 Ark. 328, 264 S.W. 972 (1924).

Color of Title.

Trial court properly quieted title in an individual, as the tax deed to the individual was sufficient and could properly have been considered color of title, and a particular quitclaim deed was also sufficient because it contained proper metes-and-bounds descriptions of the tracts in question; furthermore, the description contained in the exchange of quitclaim deeds had been used to assess the property since 1997 and the taxes had been paid on this assessment since that time. *J. Michael Enters. v. Oliver*, 101 Ark. App. 48, 270 S.W.3d 388 (2007).

Jurisdiction.

Chancery court of county where greater portion of land involved lies has jurisdiction.

Bowen v. Frank, 179 Ark. 1004, 18 S.W.2d 1037 (1929).

Fact that quieting title in plaintiff would destroy some of the defenses to a suit for possession did not lessen the power of the chancery court to remove clouds from title. *Patterson v. McKay*, 199 Ark. 140, 134 S.W.2d 543 (1939).

Where land claimed by plaintiff in suit to quiet title was either in plaintiff's possession or was wild and unimproved, equity had jurisdiction to quiet title. *Ball v. Messmore*, 226 Ark. 256, 289 S.W.2d 183 (1956).

Notice of Conveyances.

Petitioner is charged with notice of all conveyances in his chain of title. *Union Sawmill Co. v. Rowland*, 178 Ark. 372, 10 S.W.2d 858 (1928).

Pleading.

Complaint alleged facts sufficient to constitute a cause of action. *Dodson v. Abercrombie*, 218 Ark. 50, 234 S.W.2d 30 (1950).

Possession.

Only when plaintiff holds title and possession can equity be invoked to quiet title. *Gibbs v. Bates*, 150 Ark. 344, 234 S.W. 175 (1921).

Plaintiffs not shown to have possession which legally would entitle them to maintain action. *Calvert v. Haley*, 218 Ark. 752, 238 S.W.2d 664 (1951).

—Adverse.

One who acquired title to lands by adverse possession lost such title when he abandoned the land, the land was wild, and the original owner complied with the terms of this subchapter. *Moore v. Morris*, 118 Ark. 516, 177 S.W. 6 (1915).

Title cannot be quieted where land is held adversely to the plaintiff. *Simmons v. Turner*, 171 Ark. 96, 283 S.W. 47 (1926).

If a person takes possession of land and holds the same under a claim of ownership continuously, openly, adversely, for more than seven years, such person acquires title by adverse possession and will prevail in an action to quiet title. *Gibbs v. Bates*, 215 Ark. 646, 222 S.W.2d 805 (1949).

Plaintiff's title quieted as against the grantee on the basis of adverse possession. *Gibbs v. Bates*, 215 Ark. 646, 222 S.W.2d 805 (1949).

—Constructive.

Where land was wild and unimproved, and holders of tax title never had actual possession of land, confirmation decree in favor of holders of tax title was void, as person holding legal title to the land is in constructive possession. *Hensley v. Phillips*, 215 Ark. 543, 221 S.W.2d 412 (1949).

In an action to quiet title of a tract of land, the grantees' evidence that they were in actual possession of the tract of

land gave them the constructive possession of the entire tract included in the description in the warranty. *Carter v. Stewart*, 149 Ark. 189, 231 S.W. 887 (1921); *Stolz v. Franklin*, 258 Ark. 999, 531 S.W.2d 1 (1975).

Cited: *Frank v. Frank*, 175 Ark. 285, 298 S.W. 1026 (1927); *Lollar v. Appleby*, 213 Ark. 424, 210 S.W.2d 900 (1948); *White v. Thornbrough*, 229 Ark. 96, 313 S.W.2d 384 (1958).

18-60-502. Petition.

(a) A claimant shall file in the office of the clerk of the circuit court of the county in which the land is situated a petition describing the land and stating facts which show a prima facie right and title to the land in himself or herself and that there is no adverse occupant thereof.

(b)(1) The petitioner shall initiate a search of the following records in order to identify persons entitled to notice and shall provide notice pursuant to subdivision (b)(2) of this section:

- (A) Land title records in the office of the county recorder;
- (B) Tax records in the office of the county collector;
- (C) Tax records in the office of the county treasurer;
- (D) Tax records in the office of the county assessor;
- (E) For an individual, records of the probate court for the county in which the property is located;
- (F) For an individual, voter registration records maintained by the Secretary of State;
- (G) For a partnership, partnership records filed with the county clerk; and
- (H) For a business entity other than a partnership, business entity records filed with the Secretary of State.

(2)(A) The petitioner shall send notice by certified mail to the last known address in duplicate, with one (1) copy addressed by name to the person entitled to notice and the other copy addressed to "occupant", and if the certified mail is returned undelivered, the petitioner shall send a second notice by regular mail.

(B) The petitioner shall post a notice of the pending quiet title action conspicuously on the property.

(3) If the petitioner has knowledge of any other person who has, or claims to have, interest in the lands, the petitioner shall so state, and the person or persons shall be summoned as defendants in the case.

(c) The petitioner may embrace in his or her petition as many tracts of land as he or she sees proper so long as they all lie in the county.

History. Acts 1899, No. 79, §§ 2, 10, p. 133; C. & M. Dig., §§ 8363, 8364; Pope's

Dig., §§ 10959, 10960; A.S.A. 1947, §§ 34-1902, 34-1903; Acts 2007, No. 1037, § 1.

CASE NOTES

Parties.

Confirmation decree in favor of petitioner who acquired title through purchase of tax title was void where heirs of former owner were not named parties defendant. *Welch v. Burton*, 221 Ark. 173, 252 S.W.2d 411 (1952).

Cited: *Fiddymment v. Bateman*, 97 Ark. 76, 133 S.W. 192 (1910); *Ingram v. Luther*, 244 Ark. 260, 424 S.W.2d 546 (1968); *Hall v. Blanford*, 254 Ark. 590, 494 S.W.2d 714 (1973).

18-60-503. Publication of notice — Cancellation of liens.

(a)(1) Upon the filing of the petition, the clerk of the court shall publish a notice of the filing of the petition on the same day of each week, for four (4) weeks in some newspaper published in the county, if there is one, and if not, then in some newspaper having a circulation in the county.

(2) The petition shall describe the land and call upon all persons who claim any interest in the land or lien thereon to appear in the court and show cause why the title of the petitioner should not be confirmed.

(b) The circuit court within the proper county is authorized and empowered under the notice to find apparent existing liens on the real estate to be barred by the laws of limitation or laches and decree the cancellation of the liens and the records thereof.

History. Acts 1899, No. 79, § 3, p. 133; § 1; Pope's Dig., § 10962; Acts 1955, No. C. & M. Dig., § 8366; Acts 1921, No. 307, 264, § 1; A.S.A. 1947, § 34-1905.

RESEARCH REFERENCES

Ark. L. Rev. Publication of Notice, 9 Ark. L. Rev. 393.

CASE NOTES

ANALYSIS

Adverse Possession.
Compliance.
Description.
Notice Not Required.
Proof of Publication.
Warning Orders.

Adverse Possession.

In an action for adverse possession, the record owner must be a party to the proceedings or be given notice of the petition to quiet title as provided by the statute. *Koonce v. Mitchell*, 341 Ark. 716, 19 S.W.3d 603 (2000).

Compliance.

If the notice is signed by the clerk and also by the petitioner's attorney, the sig-

nature of the clerk will be treated as surplusage and the notice will be held to be in compliance with this section as one given by the petitioner. *Burbridge v. Gotsch*, 107 Ark. 136, 154 S.W. 200 (1913).

Although appellants claimed the notice requirement in this section was not complied with and the circuit court did not have jurisdiction to enter a judgment in appellees' quiet title action, the notice requirements were satisfied because appellants were the record owners of the land and were a party to the action. *Davis v. Gillam*, 2011 Ark. App. 744 (2011).

Description.

A notice which does not describe the land title which is to be quieted with sufficient detail to enable the defendant to exactly identify it from the description is

void. *Ingram v. Luther*, 244 Ark. 260, 424 S.W.2d 546 (1968).

Notice Not Required.

Koonce v. Mitchell, 341 Ark. 716, 19 S.W.3d 603 (2000), has no application where a dispute involves the location of a single boundary between two parcels of land, one of which is undisputedly owned by one party and one of which is undisputedly owned by another party. Therefore, the notice requirements of this section did not have to be met in an adverse possession case where only two parties were involved in a dispute over land separated by a fence. *Boyd v. Roberts*, 98 Ark. App. 385, 255 S.W.3d 895 (2007).

Proof of Publication.

Circuit court erred in upholding a quiet title decree because the chancery court lacked jurisdiction to enter the decree, and the decree was void and should have been set aside; because there was no proof of publication of the statutory notice for the required period, the successors in title

could not establish a prima facie case to quiet title to the mineral interest in themselves, and the chancery court lacked subject-matter jurisdiction to enter the quiet-title decree. *XTO Energy, Inc. v. Thacker*, 2015 Ark. App. 203 (2015).

Warning Orders.

Publication of notice of filing petition was not a substitute for "warning order." *Frank v. Frank*, 175 Ark. 285, 298 S.W. 1026 (1927).

Where individual's warning order in her action to quiet title to property was published only for two weeks instead of the four weeks required by subsection (a) of this section, it did not comply with the statute and, in the absence of compliance, the individual could not make a prima facie case to quiet title; thus, the trial court lacked subject-matter jurisdiction to adjudicate the rights to the land. *Crain v. Burns*, 82 Ark. App. 88, 112 S.W.3d 371 (2003).

Cited: *Abbott v. Butler*, 211 Ark. 681, 201 S.W.2d 1001 (1947).

18-60-504. Adjudication of rights.

If any person is summoned to appear in the cause, his or her rights shall be adjudicated according to the principles of equity.

History. Acts 1899, No. 79, § 8, p. 133; C. & M. Dig., § 8371; Pope's Dig., § 10967; A.S.A. 1947, § 34-1908.

18-60-505. Proof.

(a) After proof of publication of the notice as stated in § 18-60-503 has been filed, the court shall require the petitioner to prove all the allegations of the petition.

(b) Proof may be by depositions or by testimony ore tenus at the bar of the court.

History. Acts 1899, No. 79, § 4, p. 133; § 10963; Acts 1975, No. 459, § 1; A.S.A. C. & M. Dig., § 8367; Pope's Dig., 1947, § 34-1906.

CASE NOTES

Proof of Publication.

A quiet title judgment against a defendant summoned by publication was void where proof of publication was not filed until the day after rendering of the judgment. *Ingram v. Luther*, 244 Ark. 260, 424 S.W.2d 546 (1968).

Cited: *Drinkwater v. Crist*, 83 Ark. 293, 103 S.W. 733 (1907); *Ball v. Messmore*, 226 Ark. 256, 289 S.W.2d 183 (1956).

18-60-506. Prima facie title.

If the petitioner cannot show a perfect claim of title to any particular tract or tracts of land, it shall be held to constitute a prima facie title if the petitioner shall show that:

(1) The petitioner and those under whom he or she claims, have had color of title to the land for more than seven (7) years; and

(2) During that time the petitioner or those under whom he or she claims, have continuously paid the taxes thereon.

History. Acts 1899, No. 79, § 5, p. 133; C. & M. Dig., § 8368; Pope's Dig., § 10964; A.S.A. 1947, § 34-1907.

Cross References. Adverse possession, § 18-11-106.

CASE NOTES**ANALYSIS**

Applicability.

Color of Title.

Controverted Proceedings.

Evidence.

Pleadings.

Uncontroverted Proceedings.

Applicability.

Where the action to quiet title was commenced less than seven years after the purchaser at the tax sale acquired the clerk's deed and before he completed seven tax payments under it, the purchaser was not entitled to the benefit of this section. *Broadhead v. McEntire*, 19 Ark. App. 259, 720 S.W.2d 313 (1986).

Color of Title.

A certificate of purchase issued at a tax sale is not color of title. *Broadhead v. McEntire*, 19 Ark. App. 259, 720 S.W.2d 313 (1986).

There was no reasonable basis for a quiet title action where plaintiff did not show that he had color of title to the land for more than seven (7) years or that during that time he had continuously paid the taxes thereon. *Brown v. Minor*, 305 Ark. 556, 810 S.W.2d 334 (1991).

Controverted Proceedings.

Where the issues surrounding the validity of the tax proceedings were clearly controverted in the pleadings, it was error for the trial court to quiet title. *Broadhead v. McEntire*, 19 Ark. App. 259, 720 S.W.2d 313 (1986).

Evidence.

Title not quieted in appellee where appellee failed to prove payment of taxes for seven continuous years. *Stewart v. First Commercial Bank*, 59 Ark. App. 47, 953 S.W.2d 592 (1997).

Pleadings.

Petition insufficient which failed to allege color of title and payment of taxes for seven years. *Driver v. Driver*, 223 Ark. 15, 263 S.W.2d 914 (1954).

Uncontroverted Proceedings.

This section authorizes a decree of confirmation on prima facie title only where the proceedings are not controverted. *Kennedy v. Burns*, 140 Ark. 367, 215 S.W. 618 (1919).

Cited: *Towson v. Denson*, 74 Ark. 302, 86 S.W. 661 (1905); *Driver v. Driver*, 223 Ark. 15, 263 S.W.2d 914 (1954).

18-60-507. Lost or destroyed title papers.

If the petitioner alleges that his or her title papers or the record thereof has been lost or destroyed, the court shall have the power to require new title papers to be executed if the party required to execute them shall have been duly summoned in the cause.

History. Acts 1899, No. 79, § 11, p. 133; C. & M. Dig., § 8365; Pope's Dig., § 10961; A.S.A. 1947, § 34-1904.

18-60-508. Decree — Effect.

(a) If the court is satisfied as to the truth of the facts set out in the petition, it shall render a decree establishing and quieting the petitioner's title against all persons except as provided in subsection (b) of this section.

(b) The decree in the cause shall not bar or affect the rights of any person who claims through, under, or by virtue of any contract with the petitioner, or who was an adverse occupant of the land at the time the petition was filed, or any person who within seven (7) years preceding had paid the taxes on the land, or a remainderman unless the person shall have been made a defendant in the petition and personally summoned to answer it.

History. Acts 1899, No. 79, §§ 4, 6, p. 133; C. & M. Dig., §§ 8367, 8369; Acts 1927, No. 64, § 1; Pope's Dig., §§ 10963,

10965; Acts 1975, No. 459, § 1; A.S.A. 1947, §§ 34-1906, 34-1909.

CASE NOTES

ANALYSIS

Attack on Decree.
Dower.
Persons Not Bound.
Property Affected.
Void Tax Deed.

Attack on Decree.

Decree of confirmation was void on direct attack at the instance of one who had paid the taxes on the land for the statutory period preceding such confirmation and who was not made a defendant and served with process in the action. *Quermous v. Bilby*, 144 Ark. 98, 221 S.W. 856 (1920); *Grayling Lumber Co. v. Tillar*, 162 Ark. 221, 258 S.W. 132 (1924).

A decree confirming a title to land is conclusive on collateral attack against all persons, whether named as parties or not and whether life tenants or remaindermen, except for jurisdictional defects shown on the record. *Champion v. Williams*, 165 Ark. 328, 264 S.W. 972 (1924).

Action to set aside and vacate decree of confirmation of title brought by claimants who had paid taxes on the property had not been made parties defendant to quiet title action was a direct attack on the decree, not an impermissible collateral

attack. *Hall v. Blanford*, 254 Ark. 590, 494 S.W.2d 714 (1973).

Summary judgment was improperly granted to an operator and a lessee as they failed to show evidence of entitlement to litigate the validity of a 1976 quiet-title decree based on potential claimants, thus, the limitations in § 18-60-510 applied, and a collateral attack was improper since there were no jurisdictional defects; the operator and the lessee failed to show how any potential claimant came within the reach of subsection (b) of this section as they did not identify any individual who they claimed was seeking royalties, or show that a predecessor in title adverse to the owners was known, but not named in the 1976 action. *Verkamp v. Floyd E. Sagely Props.*, 96 Ark. App. 61, 238 S.W.3d 619 (2006).

Dower.

A decree confirming a title purchased at a mortgage foreclosure sale will not preclude the widow of the mortgagor from suing for dower in the mortgaged land if her right to dower was not put in issue in the foreclosure suit and she was not made a party to the confirmation proceeding. *Fourche River Lumber Co. v. Walker*, 96 Ark. 540, 132 S.W. 451 (1910).

Persons Not Bound.

Where title is sought to be confirmed under general notice by publication, a decree shall not bar or affect the rights of any person who was an adverse occupant of the land at the time the petition was filed. *Hargis v. Lawrence*, 135 Ark. 321, 204 S.W. 755 (1918).

Where predecessor of plaintiff in title paid taxes on land for required period prior to filing of confirmation petition by owners of tax title, and predecessor was not made a party to the confirmation proceeding, the confirmation decree was not binding on plaintiff. *Hensley v. Phillips*, 215 Ark. 543, 221 S.W.2d 412 (1949).

Title cannot be quieted on constructive service against a defendant who had paid taxes on the disputed land for the statu-

tory period. *Ingram v. Luther*, 244 Ark. 260, 424 S.W.2d 546 (1968).

Property Affected.

Decree confirming sale of several tracts was held to be a confirmation of each tract included therein. *Fiddymment v. Bateman*, 97 Ark. 76, 133 S.W. 192 (1910).

Void Tax Deed.

Tax deed having a void description will not be confirmed. *Rucker v. Arkansas Land & Timber Co.*, 128 Ark. 180, 194 S.W. 21 (1917).

Cited: *Towson v. Denson*, 74 Ark. 302, 86 S.W. 661 (1905); *Drinkwater v. Crist*, 83 Ark. 293, 103 S.W. 733 (1907); *Ball v. Messmore*, 226 Ark. 256, 289 S.W.2d 183 (1956).

18-60-509. Recording of decree.

A certified copy of any decree confirming title to real estate shall be entitled to record in the books kept for the record of deeds in the county in which the decree was granted.

History. Acts 1899, No. 79, § 12, p. 133; C. & M. Dig., § 8373; Pope's Dig., § 10969; A.S.A. 1947, § 34-1912.

CASE NOTES

Cited: *Hensley v. Phillips*, 215 Ark. 543, 221 S.W.2d 412 (1949).

18-60-510. Setting aside decree.

(a) Any person may appear within three (3) years and set aside the decree if he or she shall offer to file a meritorious defense.

(b) Every person laboring under the disability of infancy or individuals with mental illness or intellectual disabilities, and those claiming under them, may set aside the decree at any time within three (3) years after the removal of their disability.

History. Acts 1899, No. 79, § 7, p. 133; C. & M. Dig., § 8370; Pope's Dig., § 10966; A.S.A. 1947, § 34-1910.

CASE NOTES**ANALYSIS**

Applicability.
Meritorious Defenses.
Perfecting Title.

Applicability.

This section does not apply to parties mentioned in § 18-60-508(b). *Hargis v. Lawrence*, 135 Ark. 321, 204 S.W. 755 (1918).

Provision of this section requiring that suit to vacate confirmation decree be brought within statutory period does not apply where heirs of former owner were not made parties defendant, as provided for in § 18-60-502. *Welch v. Burton*, 221 Ark. 173, 252 S.W.2d 411 (1952).

Summary judgment was improperly granted to an operator and a lessee as they failed to show evidence of entitlement to litigate the validity of a 1976 quiet-title decree based on potential claimants; thus, the limitations in this section applied, and a collateral attack was improper since there were no jurisdictional defects. *Verkamp v. Floyd E. Sagely Props.*, 96 Ark. App. 61, 238 S.W.3d 619 (2006).

Action to set aside a 1991 decree was not barred by the three-year statute of limitations because it did not apply where notice was not given to a person claiming an interest in property or minerals. *Wright v. Viele*, 2013 Ark. App. 471, 429 S.W.3d 314 (2013).

Case was a direct, not collateral, attack on a quiet title decree because a lessee brought the case for the very purpose of having the quiet title decree declared void

ab initio. *XTO Energy, Inc. v. Thacker*, 2015 Ark. App. 203 (2015).

Meritorious Defenses.

Motion to vacate decree showed a meritorious defense. *Abbott v. Butler*, 211 Ark. 681, 201 S.W.2d 1001 (1947).

Original owner of land who remained in possession for period of years after date of tax sale was entitled to file petition to set aside decree quieting title in United States based on invalidity of tax sale due to overcharge of five cents against land sold. *United States v. Williams*, 109 F. Supp. 456 (W.D. Ark. 1952).

Even if all the requirements of this subchapter are met and complied with and the decree entered is a perfectly valid decree, the defendants have the statutory period from the entry of the decree to appear and set aside the decree by offering to file a meritorious defense. *Ingram v. Luther*, 244 Ark. 260, 424 S.W.2d 546 (1968).

Perfecting Title.

A record title is perfected at the end of statutory period. *Dalton v. Lybarger*, 152 Ark. 192, 237 S.W. 694 (1922).

Cited: *Hall v. Blanford*, 254 Ark. 590, 494 S.W.2d 714 (1973).

18-60-511. Costs.

The costs of the proceedings shall be adjudged against the petitioner if there is no other party to the proceedings, and otherwise the costs shall be adjudged according to the principles of equity.

History. Acts 1899, No. 79, § 9, p. 133; C. & M. Dig., § 8372; Pope's Dig., § 10968; A.S.A. 1947, § 34-1911.

SUBCHAPTER 6 — QUIETING TITLE — PUBLIC SALES

SECTION.

- 18-60-601. Proceedings to confirm public sales.
- 18-60-602. Petition for confirmation — Affidavit.
- 18-60-603. Publication of notice.
- 18-60-604. Petition taken as confessed.
- 18-60-605. Trial of sale validity.

SECTION.

- 18-60-606. Evidence at trial.
- 18-60-607. Confirmation of sale.
- 18-60-608. Effect of decree confirming sale.
- 18-60-609. Effect of title not confirmed.
- 18-60-610. Costs.

Cross References. State lands, § 22-5-401.

Effective Dates. Acts 1893, No. 72, § 2: effective on passage.

Acts 1893, No. 95, § 4: effective on passage.

Acts 1939, No. 318, § 4: effective 90 days after passage.

Acts 1951, No. 263, § 4: Mar. 19, 1951. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that heretofore purchasers of land in Levee and Drainage Improvement Districts acquired at fore-

closure proceedings for delinquent taxes due said districts have been unable to confirm title to such lands and that enactment of this bill will provide such means. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health and safety shall take effect and be in force from the date of its approval."

RESEARCH REFERENCES

Ark. L. Rev. Bills to Remove Cloud on Title and Quieting Title, 6 Ark. L. Rev. 83.

CASE NOTES

ANALYSIS

In General.

Pleading and Practice.

In General.

This subchapter has specific application and was not repealed by §§ 18-60-501 — 18-60-511. *Ex parte Morrison*, 69 Ark. 517, 64 S.W. 270 (1901).

Pleading and Practice.

Proceedings for confirmation of title brought under this subchapter must be governed by ordinary rules of chancery practice, except where otherwise prescribed by this subchapter. *Payne v. Danley*, 18 Ark. 441 (1857).

18-60-601. Proceedings to confirm public sales.

The purchasers, or the heirs and legal representatives of purchasers, of lands at sheriff's sales or those made by the county clerks, or by the Commissioner of State Lands, or from levee or drainage improvement districts, who have acquired title by purchase at the sale held by the sheriff or by foreclosure proceedings for taxes due the districts, in pursuance of any of the laws thereof, or those made by the order, decree, or authority of any court of record, may protect themselves from eviction of the lands so purchased, or from any responsibility as possessors of them, by proceeding in the manner provided in this subchapter.

History. Rev. Stat., ch. 149, § 1; Acts § 8379; Pope's Dig., § 10975; Acts 1951, 1881, No. 69, § 1, p. 134; C. & M. Dig., No. 263, § 1; A.S.A. 1947, § 34-1918.

CASE NOTES

ANALYSIS

Applicability.
Parties.
Possession.
Tax Sales.
—Void.

Applicability.

This section has no application to an action for confirmation of title to undivided interests in mineral rights. *Schuman v. Certain Lands*, 223 Ark. 85, 264 S.W.2d 413 (1954).

Parties.

The purchaser at a tax sale being dead, his grantee need not make such purchaser's heirs or executors parties to a bill of confirmation. *Scott v. Watkins*, 22 Ark. 556 (1861).

Possession.

Actual possession by the purchaser of land sold for taxes is not necessary in order to bring a bill for confirmation of title and a tax deed in the usual form is prima facie evidence of the regularity of the sale. *Bonnell v. Roane*, 20 Ark. 114 (1859).

Tax Sales.

Equitable owner may bring suit to confirm tax title on which equitable title is based. *Ingram v. Sherwood*, 75 Ark. 176, 87 S.W. 435 (1905).

Debtor who was in possession of the property at issue and who claimed an equitable interest in the property was entitled to challenge the quiet title action asserted by the subsequent purchaser, after that purchaser bought the property in a tax sale and sought to quiet title under § 18-60-601, because the debtor had alleged an equitable interest in the property and the debtor had not received notice of the tax sale. *In re Paro*, 362 B.R. 419 (Bankr. E.D. Ark. 2007).

—Void.

A tax sale of land under unconstitutional statute is void, and a decree confirming it is invalid. *Mason v. Gates*, 82 Ark. 294, 102 S.W. 190 (1907). See *Burbridge v. Gotsch*, 107 Ark. 136, 154 S.W. 200 (1913).

A tax sale void for want of clerk's certificate showing publication of notice of sale is rendered valid by confirmation. *Osceola Land Co. v. Chicago Mill & Lumber Co.*, 84 Ark. 1, 103 S.W. 609 (1907).

A tax sale is not rendered valid by confirmation if void for patent ambiguity in description of property. *Hornor v. Jarrett*, 99 Ark. 154, 137 S.W. 820 (1911).

Tax sales are rendered valid by confirmation if void because of irregularity in signing notice of sale. *Burbridge v. Gotsch*, 107 Ark. 136, 154 S.W. 200 (1913).

Cited: *Howell v. McMillan*, 217 Ark. 430, 230 S.W.2d 654 (1950); *Heinen v. Dixon*, 236 Ark. 1, 364 S.W.2d 153 (1963).

18-60-602. Petition for confirmation — Affidavit.

(a) The petition for confirmation shall be filed with the clerk of the circuit court of the county at least twenty (20) days prior to the first day of the term of court at which application is to be made.

(b) The petitioner, if he or she is acquainted with the lands, shall file with his or her petition his or her affidavit, or the affidavit of some person who is acquainted with the lands, showing that there is no person in actual possession of the lands claiming title adverse to the petitioner, proof that taxes owed on the lands were either paid, settled, or released shall be filed with the petition and, in the case of levee or drainage improvement districts, proof of payment, settlement, or release of all delinquent taxes.

History. Rev. Stat., ch. 149, § 3; Acts §§ 8384, 8385; Pope's Dig., §§ 10980, 1893, No. 95, § 2, p. 165; C. & M. Dig., 10981; Acts 1951, No. 263, § 2; A.S.A.

1947, § 34-1920; Acts 2007, No. 1037, § 2.

CASE NOTES

ANALYSIS

Applicability.
Adverse Possession.
Tax Payments.

Applicability.

This section applies only to actions in rem. *Kanuff v. National Cooperage Co.*, 87 Ark. 494, 113 S.W. 28 (1908).

This section has no application to an action for confirmation of title to undivided interests in mineral rights. *Schuman v. Certain Lands*, 223 Ark. 85, 264 S.W.2d 413 (1954).

Adverse Possession.

A plaintiff cannot maintain a suit in equity to confirm a tax title to land held adversely by the defendant. *Pearman v. Pearman*, 144 Ark. 528, 222 S.W. 1064 (1920).

Tax Payments.

The three consecutive annual payments of taxes may consist of one payment made before and two after expiration of period of redemption. *Porter v. Tallman*, 68 Ark. 211, 56 S.W. 1071 (1900).

18-60-603. Publication of notice.

(a)(1) When land is not made redeemable by any law of this state applicable to the sale, or, if redeemable, at any time after the expiration of the time allowed for the redemption, at all sales which have been or may be made, the purchaser, the heirs and legal representative of the purchaser, or the assignee of the purchaser or the heirs or legal representative of the assignee, may publish a notice.

(2) This notice shall be published four (4) weeks in succession in some newspaper published in the county where the land lies, if there is a newspaper published in the county or, if not, in the nearest newspaper having a bona fide circulation in the county.

(3) The notice shall call on all persons who can set up any right to the land so purchased in consequence of any informality or any irregularity connected with the sale to show cause, at the first term of the circuit court of the county after the publication of the notice, why the sale so made should not be confirmed.

(4) The notice shall state the authority under which the sale took place and give the description of the land purchased and the nature of the title by which it is held.

(b) The last insertion of the notice in the newspaper shall be at least twenty (20) days before the application for confirmation is submitted to the court for trial.

(c) Proof of the publication of the notice shall be made in the same manner as proof of publication of notices in other circuit court causes.

(d) The clerk of the court shall notify any delinquent tax owner or owners at their last known address by registered mail at least twenty (20) days before the application for confirmation is submitted to the court for trial.

History. Rev. Stat., ch. 149, § 2; Acts 10978; Acts 1951, No. 349, § 1; 1955, No. 1893, No. 95, § 1, p. 165; C. & M. Dig., 264, § 2; A.S.A. 1947, § 34-1919; Acts §§ 8380-8382; Pope's Dig., §§ 10976-2005, No. 1962, § 77.

RESEARCH REFERENCES

Ark. L. Rev. Publication of Notice, 9 Ark. L. Rev. 393.

CASE NOTES

ANALYSIS

Applicability.

Duration.

Proof.

Applicability.

This section has no application to an action for confirmation of title to undivided interests in mineral rights. *Schuman v. Certain Lands*, 223 Ark. 85, 264 S.W.2d 413 (1954).

Duration.

Where confirmation decree showed on its face that publication was made for less

than the required time period, court had no jurisdiction to issue confirmation decree. *Howell v. McMillan*, 217 Ark. 430, 230 S.W.2d 654 (1950) (decision prior to 1955 amendment).

Proof.

Proof of publication in suit to confirm tax title will be presumed from recital of due notice in the record. *Porter v. Tallman*, 68 Ark. 211, 56 S.W. 1071 (1900).

Cited: *Parkerson v. Brown*, 2013 Ark. App. 718, 430 S.W.3d 864 (2013).

18-60-604. Petition taken as confessed.

If the deed or deeds are in proper legal form and properly executed, if there is proof showing payment, settlement, or release of the taxes, and if the evidence shows that no one is in possession adverse to the petitioner, then in case no one has appeared to show cause against the prayer of the petitioner, the petition shall be taken as confessed and the court shall render final decrees confirming the sale in question.

History. Rev. Stat., ch. 149, § 4; Acts No. 263, § 3; A.S.A. 1947, § 34-1921; Acts 1893, No. 95, § 3, p. 165; C. & M. Dig., 2007, No. 1037, § 3. § 8388; Pope's Dig., § 10984; Acts 1951,

18-60-605. Trial of sale validity.

In case any person or persons claiming title to the land opposed the confirmation of sale, then the court shall try the validity of the sale and the court shall:

- (1) Confirm the sale if the sale was valid; or
- (2) Annul the sale if the sale has been made contrary to law.

History. Rev. Stat., ch. 149, § 4; Acts § 8389; Pope's Dig., § 10985; Acts 1951, 1893, No. 95, § 3, p. 165; C. & M. Dig., No. 263, § 3; A.S.A. 1947, § 34-1921.

CASE NOTES

Opposing Parties.

To entitle one not in adverse possession to oppose confirmation of a tax title, it is sufficient for him to allege and prove such a state of facts as will show that he might in good faith claim some interest in the right to the land. *Thweatt v. Howard*, 68 Ark. 426, 59 S.W. 764 (1900).

One who has color of title and in whose name the taxes have been assessed, and who has paid taxes on the land, has such an interest in the land as will entitle him to oppose confirmation. *Alexander v. Capps*, 100 Ark. 488, 140 S.W. 722 (1911).

18-60-606. Evidence at trial.

(a)(1) On the trial of the cause, the petitioner shall exhibit to the court proof that taxes owed on the lands were either paid, settled, or released and, in the case of lands acquired from levee and drainage improvement districts:

(A) All delinquent taxes that have been paid, settled, or released;

(B) The deed or deeds under which he or she claims title, or the record thereof, or a certified copy or copies from the record; and

(C) Oral or written proof by one (1) or more witnesses acquainted with the lands showing that no one is in possession claiming adverse to the petitioner.

(2) The name of the witness or witnesses so sworn shall be preserved in the decree.

(b) A sheriff's or land commissioner's deed, given in the usual form, without witnesses, shall be taken and considered by the court as sufficient evidence of the authority under which the sale was made, the description of the land, and the price at which it was purchased.

History. Rev. Stat., ch. 149, §§ 4, 5; Acts 1893, No. 95, § 3, p. 165; C. & M. Dig., §§ 8386, 8387, 8390; Pope's Dig., §§ 10982, 10983, 10986; Acts 1951, No. 263, § 3; A.S.A. 1947, §§ 34-1921, 34-1922; Acts 2007, No. 1037, § 4.

Cross References. Deeds of commissioner of state lands as evidence, § 22-6-108.

CASE NOTES

ANALYSIS

Clerk's Deed.
Sheriff's Deed.

Clerk's Deed.

A tax deed executed by the county clerk is prima facie evidence of title, and in absence of controverting testimony the

title may be confirmed. *Senter v. Greer*, 101 Ark. 301, 142 S.W. 178 (1911).

Sheriff's Deed.

Sheriff's deed is evidence that sale was regularly made, without proof that sale was confirmed by the court. *Winfrey v. People's Sav. Bank*, 176 Ark. 941, 5 S.W.2d 360 (1928).

18-60-607. Confirmation of sale.

(a) There should be no confirmation of the sale of any lands that are in actual possession of any person claiming title adverse to the petitioner, nor shall there be any confirmation of the sale of lands

unless the petitioner or his or her grantor or those under whom he or she claims title submits proof that all taxes owed on the lands have been paid, settled, or released.

(b) With respect to land in levee and drainage improvement districts, there shall be no confirmation of sale unless title has been acquired as referred to in § 18-60-601, nor unless the petitioner or his or her grantor or grantors exhibit proof of payment, settlement, or release of all taxes that are due against the lands in the districts at the time of the rendition of the decree of confirmation by the court.

History. Rev. Stat., ch. 149, § 3; Acts No. 263, § 2; A.S.A. 1947, § 34-1920; Acts 1893, No. 95, § 2, p. 165; C. & M. Dig., 2007, No. 1037, § 5. § 8383; Pope's Dig., § 10979; Acts 1951,

CASE NOTES

ANALYSIS

Applicability.
Adverse Possession.
Equitable Title.
Tax Payments.

Applicability.

This section applies only to actions in rem. *Kanuff v. National Cooperage Co.*, 87 Ark. 494, 113 S.W. 28 (1908).

This section has no application to an action for confirmation of title to undivided interests in mineral rights. *Schuman v. Certain Lands*, 223 Ark. 85, 264 S.W.2d 413 (1954).

Adverse Possession.

A plaintiff cannot maintain a suit in equity to confirm a tax title to land held adversely by the defendant. *Pearman v. Pearman*, 144 Ark. 528, 222 S.W. 1064 (1920).

Equitable Title.

A decree of confirmation of a tax title is not invalid because the notice alleges that the legal title was in the petitioner when he held only the equitable title, nor because the petitioner had contracted to sell the land when the title was confirmed. *Ingram v. Sherwood*, 75 Ark. 176, 87 S.W. 435 (1905).

Tax Payments.

The three consecutive annual payments of taxes may consist of one payment made before and two after expiration of period of redemption. *Porter v. Tallman*, 68 Ark. 211, 56 S.W. 1071 (1900).

Confirmation decree is not valid, if owners of tax title fail to pay taxes as required by subsection (a). *Hensley v. Phillips*, 215 Ark. 543, 221 S.W.2d 412 (1949).

Cited: *Fulkerson v. Calhoun*, 58 Ark. 63, 58 Ark. App. 63, 946 S.W.2d 714 (1997).

18-60-608. Effect of decree confirming sale.

(a)(1) The judgment or decree of the court confirming the sale shall operate as a complete bar against any and all persons who may thereafter claim the land in consequence of informality or illegality in the proceedings.

(2) The title to the land shall be considered as confirmed and complete in the purchaser thereof, his or her heirs and assigns forever, saving, however, to infants, persons of unsound mind, or individuals imprisoned overseas, the right to appear and contest the title to the land within one (1) year after their disabilities may be removed.

(b) The decree shall not be valid for any purpose as against the owner of the land, his heirs or assigns, who was, at the time of the decree

rendered, in actual possession of it, unless he or she is made a party to the action by personal service of notice therein.

History. Rev. Stat., ch. 149, § 6; Acts § 8391; Pope's Dig., § 10987; Acts 1939, 1893, No. 72, § 1, p. 117; C. & M. Dig., No. 318, § 1; A.S.A. 1947, § 34-1923.

CASE NOTES

ANALYSIS

Certification.
Persons Benefitted.
Persons Not Bound.
Persons under Disability.
Possession.
Publication.
Redemption.
Title.
Validity of Tax Sale.

Certification.

A decree was not defective for clerk's failure to certify as to the official character of justice before whom proof was made. *Webb v. Kelsey*, 66 Ark. 180, 49 S.W. 819 (1899).

Persons Benefitted.

Where a purchaser of land at a tax sale conveyed it to another by warranty deed, a decree of confirmation of such tax title, rendered after such conveyance was made, will inure to the benefit of the grantee therein. *Tupy v. Kocourek*, 66 Ark. 433, 51 S.W. 69 (1899).

Persons Not Bound.

Where the owner of land has in fact paid his taxes, he is not required to look to the papers to see if his land is advertised, and if it is sold without actual notice to him, the sale cannot be confirmed. *Wallace v. Brown*, 22 Ark. 118 (1860).

Where a prior owner sold the land with warranty before a decree of confirmation, he was not bound to defend against the confirmation and is not estopped to show in a suit on his warranty that the tax sale was void. *Lonergan v. Baber*, 59 Ark. 15, 26 S.W. 13 (1894).

Person who had entered into contract to purchase land and who at time of tax sale was in actual possession but was not served was entitled to attack validity of confirmation decree. *Heinen v. Dixon*, 236 Ark. 1, 364 S.W.2d 153 (1963).

Persons under Disability.

Rights of minors to redeem are not barred by confirmation, but where parents from whom minors inherit were barred by laches, the minors did not acquire any rights. *Avera v. Banks*, 168 Ark. 718, 271 S.W. 970 (1925).

Possession.

A decree under this section confirming a tax title cannot preclude a party in possession of the land from the benefit arising from lapse of time prior to the rendition of the decree — the proceeding for confirmation being in no-wise a possessory proceeding. *Buckingham v. Hallett*, 24 Ark. 519 (1867).

Publication.

A decree was held not void for insufficiency of proof of publication. *Porter v. Dooley*, 66 Ark. 1, 49 S.W. 1083 (1898).

Redemption.

Confirmation does not preclude the right to redeem. *Smith v. Thornton*, 74 Ark. 572, 86 S.W. 1008 (1905).

Title.

All inquiry as to validity of the plaintiff's title is cut off by the decree of confirmation. *Boehm v. Botsford*, 52 Ark. 400, 12 S.W. 786 (1889).

Validity of Tax Sale.

A decree confirming a tax title cuts off all controversy as to mere irregularities of the original tax sale and forfeitures, such as errors as to the assessment and the return made thereof, the advertisement and the payments in part of the taxes, and any subsequent misconduct or mistake of the officers. *Martin v. Hawkins*, 62 Ark. 421, 35 S.W. 1104 (1896).

The invalidity of a tax sale is a meritorious defense to confirmation of title. *Heinen v. Dixon*, 236 Ark. 1, 364 S.W.2d 153 (1963).

18-60-609. Effect of title not confirmed.

In case any purchaser or purchasers contemplated in any of the provisions of this subchapter, or his, her, or their heirs or assigns, shall not deem it necessary to use the remedy conferred by this subchapter to confirm the title thereto, then the sale shall have the same effect only as is given to it by the existing laws of this state.

History. Rev. Stat., ch. 149, § 12; C. & M. Dig., § 8393; Pope's Dig., § 10989; A.S.A. 1947, § 34-1925.

18-60-610. Costs.

(a) When no opposition is made to the confirmation of the sale, the costs attending the proceedings shall be paid by the party praying for confirmation.

(b) Where opposition is made, the costs shall be borne by the party against whom judgment is rendered.

History. Rev. Stat., ch. 149, § 7; C. & M. Dig., § 8392; Pope's Dig., § 10988; A.S.A. 1947, § 34-1924.

SUBCHAPTER 7 — QUIETING TITLE — RAILROADS

SECTION.

18-60-701. Proceedings against railroads, their successors and assigns.

18-60-702. Liberally construed.

18-60-703. Petition — Verification and certification.

SECTION.

18-60-704. Publication of notice.

18-60-705. Proof — Determination.

18-60-706. Recording of decree.

18-60-707. Effect of decree.

18-60-708. Costs.

Effective Dates. Acts 1911, No. 267, § 6; May 10, 1911. Emergency declared.

RESEARCH REFERENCES

Ark. L. Rev. Bills to Remove Cloud on Title and Quieting Title, 6 Ark. L. Rev. 83.

18-60-701. Proceedings against railroads, their successors and assigns.

Any person owning land that is wild and unimproved or land that is in the actual possession of himself or herself or those claiming under him or her which has, at any time, been deeded, granted, donated, or subscribed to any railroad under the provisions of an act of the General

Assembly entitled, "An act in aid of internal improvement", approved April 8, 1869, or acts amendatory and supplemental thereto, or land that is claimed to have been, at any time, deeded, granted, donated, or subscribed to any railroad under the provisions of those acts, may have his or her title thereto confirmed and quieted as against the railroad, its successors and assigns, and as against any persons so deeding or claiming to have deeded, granted, donated, or subscribed the land, or their heirs and assigns, and any and all persons claiming by, through, or under them, or either of them, by proceeding in the manner provided in this subchapter.

History. Acts 1911, No. 267, § 1; C. & M. Dig., § 8374; Pope's Dig., § 10970; A.S.A. 1947, § 34-1913.

Publisher's Notes. The act referred to in this section was Acts 1869 (Adj. Sess.), No. 65, which provided that when land

sold to state for taxes was thereafter conveyed to a railroad, the taxes would be canceled. The operative provisions of the act were repealed by Acts 1887, No. 102, § 1.

18-60-702. Liberally construed.

This subchapter shall be liberally construed so as to effectuate its purpose.

History. Acts 1911, No. 267, § 5; C. & M. Dig., § 8378; Pope's Dig., § 10974; A.S.A. 1947, § 34-1917.

18-60-703. Petition — Verification and certification.

(a) A person may file the petition in the circuit court of the county in which the land is situated, describing the land and setting forth his or her title thereto and alleging that there is no person in the adverse possession thereof and that the land has been deeded, granted, donated, or subscribed to a railroad under the provisions of the acts mentioned in § 18-60-701, or is claimed to have been so deeded, granted, donated, or subscribed, and praying that title thereto may be confirmed and quieted as against the railroad, its successors and assigns, and as against any persons deeding, granting, donating, or subscribing the land, or claimed to have deeded, granted, donated, or subscribed the land, or their heirs and assigns, and all others claiming by, through, or under them, or either of them.

(b) Any number of tracts may be embraced in the same petition when they all lie in the same county.

(c) The petition shall be verified, and there shall be endorsed thereon a certificate of the attorney filing the petition to the effect that he or she has examined the title of the petitioner as set forth in the petition and that in his or her opinion the petition is well founded in law and true in fact. When so verified and certified, the petition shall be taken as prima facie true, and the petitioner shall be entitled to a decree thereon.

History. Acts 1911, No. 267, §§ 2, 4; C. §§ 10971, 10973; A.S.A. 1947, §§ 34- & M. Dig., §§ 8375, 8377; Pope's Dig., 1914, 34-1916.

18-60-704. Publication of notice.

Upon the filing of the petition, the clerk of the court shall publish for four (4) weeks in some weekly newspaper published in the county a notice of the filing of the petition, describing the lands and the alleged conveyance to the railroad as set forth in the petition, and calling upon all persons claiming any interest in the lands to appear at the next term of the circuit court of the county and show cause, if they can, why the title of the petitioner should not be confirmed and quieted in him or her as against the railroad, its successors and assigns, and the alleged grantor, his or her heirs and assigns, and all others claiming by, through, or under them, or either of them.

History. Acts 1911, No. 267, § 3; C. & M. Dig., § 8376; Pope's Dig., § 10972; A.S.A. 1947, § 34-1915.

RESEARCH REFERENCES

Ark. L. Rev. Publication of Notice, 9
Ark. L. Rev. 393.

18-60-705. Proof — Determination.

If any person appears to contest the petition, the burden of proof shall rest upon the person so appearing, and the court shall determine the rights of the parties in accordance with the principles and practice in equity and decree accordingly.

History. Acts 1911, No. 267, § 4; C. & M. Dig., § 8377; Pope's Dig., § 10973; A.S.A. 1947, § 34-1916.

18-60-706. Recording of decree.

A certified copy of the decree shall be entitled to record in the deed records of the county where rendered.

History. Acts 1911, No. 267, § 5; C. & M. Dig., § 8378; Pope's Dig., § 10974; A.S.A. 1947, § 34-1917.

18-60-707. Effect of decree.

The decree in any such cause shall be an absolute bar as against the title of any railroad, its successors and assigns, and the person deeding or claimed to have deeded, granted, donated, or subscribed the lands to the railroads, his or her heirs and assigns, and all others claiming the lands by, through, or under them, or either of them.

History. Acts 1911, No. 267, § 5; C. & M. Dig., § 8378; Pope's Dig., § 10974; A.S.A. 1947, § 34-1917.

18-60-708. Costs.

The petitioner shall pay the costs when there is no contest, and in case of contest, the cost shall be adjudged by the court.

History. Acts 1911, No. 267, § 4; C. & M. Dig., § 8377; Pope's Dig., § 10973; A.S.A. 1947, § 34-1916.

SUBCHAPTER 8 — RECOVERY OF PERSONAL PROPERTY AND REPLEVIN

SECTION.

- 18-60-801. Definitions.
- 18-60-802. Existing laws not affected.
- 18-60-803. Penalties — Damages and fee.
- 18-60-804. Petition for recovery of personal property.
- 18-60-805. Notice of hearing.
- 18-60-806. Hearing.
- 18-60-807. Immediate appearance — Impounding of property.
- 18-60-808. Alternative procedure.
- 18-60-809. Replevin.
- 18-60-810. Affidavit for replevin.
- 18-60-811. Order for delivery of property.
- 18-60-812. Bond.
- 18-60-813. Execution of order.

SECTION.

- 18-60-814. Orders directed to other counties.
- 18-60-815. Disposition of property replevied.
- 18-60-816. Redelivery bond.
- 18-60-817. Appraisement of property before taking bond.
- 18-60-818. Claim of third party to property.
- 18-60-819. Arrest and discharge of defendant.
- 18-60-820. Judgments generally.
- 18-60-821. Judgment against sureties.
- 18-60-822. Assessment of value and damages.

Effective Dates. Acts 1871, No. 48, § 1 [890]: effective 90 days after passage.

Acts 1875 (Adj. Sess.), No. 86, § 4: effective on passage.

Acts 1885, No. 12, § 3: effective on passage.

Acts 1887, No. 29, § 2: effective on passage.

Acts 1973, No. 144, § 10: Feb. 19, 1973. Emergency clause provided: "It is determined by the General Assembly that, due to the decision of the Supreme Court of the United States in *Fuentes v. Shevin*, decided June 12, 1972, holding that writs of replevin cannot constitutionally issue without prior notice to the party in possession of personal property, there exists

doubt as to the constitutionality of the Arkansas replevin laws. Due to the uncertainty created by the foregoing decision, persons with an enforceable right in personal property are being denied a procedure which enables such rights to be properly enforced, and the value of property held as collateral for loans, or for other reasons, is in danger of diminishing during the interim when such enforcement is delayed. Therefore an emergency is hereby declared to exist and this Act being necessary for immediate preservation of the public peace, health and safety shall be in effect from the date of passage and approval."

RESEARCH REFERENCES

Am. Jur. 66 Am. Jur. 2d, Replev., § 1 et seq.

Ark. L. Notes. Copeland, Recent Arkansas Cases Involving Article Nine of the U.C.C., 1995 Ark. L. Notes 31.

Ark. L. Rev. Conditional Sales in Arkansas, 4 Ark. L. Rev. 19.

The Old and the New: Article IX, 16 Ark. L. Rev. 145.

Commercial Law — Repossession of Chattels — Notice and Opportunity for Prior Hearings in Replevin, 26 Ark. L. Rev. 534.

Creditors' Provisional Remedies and Debtors' Due Process Rights: Attachment and Garnishment in Arkansas, 31 Ark. L. Rev. 607.

Creditors' Provisional Remedies and Debtors' Due Process Rights: Statutory Liens in Arkansas, 32 Ark. L. Rev. 185.

Nickles, A Localized Treatise On Secured Transactions — Part II: Creating Security Interests, 34 Ark. L. Rev. 559.

Case Note, White v. Gladden: A Change in Law of Damages or a Change in Evidentiary Burden?, 37 Ark. L. Rev. 718.

C.J.S. 77 C.J.S., Replev., § 1 et seq.

U. Ark. Little Rock L.J. Maltz, State Action and Statutory Liens in Arkansas — A Reply to Professor Nickles, 2 U. Ark. Little Rock L.J. 357.

Notes, UCC Article 9 — Disposition of Repossessed Collateral Notice and Deficiency — A New Rule in Arkansas, Rhodes v. Oaklawn Bank, 279 Ark. 51, 648 S.W.2d 470 (1983), 6 U. Ark. Little Rock L.J. 585.

18-60-801. Definitions.

As used in this section and §§ 18-60-802 — 18-60-808:

- (1) "Order of delivery" means a "writ of replevin"; and
- (2) "Party" or "person" means individuals, corporations, partnerships, associations, or any entity having the legal capacity to sue or be sued.

History. Acts 1973, No. 144, § 7; A.S.A. 1947, § 34-2125.

CASE NOTES

Cited: Olmstead v. Logan, 298 Ark. 421, 768 S.W.2d 26 (1989); Webster Bus. Credit Corp. v. Bradley Lumber Co., No. 1:08-CV-01083-HFB, 2008 U.S. Dist. LEXIS 105520 (W.D. Ark. Dec. 18, 2008).

18-60-802. Existing laws not affected.

This section and §§ 18-60-801 and 18-60-803 — 18-60-808 shall not repeal any existing law pertaining to the recovery of personal property by parties claiming an interest therein.

History. Acts 1973, No. 144, § 9; A.S.A. 1947, § 34-2126.

CASE NOTES

Cited: *Olmstead v. Logan*, 298 Ark. 421, 768 S.W.2d 26 (1989).

18-60-803. Penalties — Damages and fee.

(a) Any person who willfully and knowingly damages property in which there exists a valid right to issuance of an order of delivery, or on which an order has been sought under the provisions of this section and §§ 18-60-801 — 18-60-802 and 18-60-804 — 18-60-808, or who conceals it, with the intent to interfere with enforcement of the order, or who removes it from the jurisdiction of the court in which the action is pending with the intention of defeating enforcement of an order of delivery, or who willfully refuses to disclose its location to an officer charged with executing an order for its delivery, or, if the property is in his or her possession, willfully interferes with the officer charged with executing the writ shall be guilty of a misdemeanor.

(b) If convicted, he or she shall be subject to a fine of not more than one thousand dollars (\$1,000) and imprisonment for a term of not more than six (6) months, or both.

(c) In addition to these criminal penalties, he or she shall be liable to the plaintiff for double the amount of damage done to the property, together with a reasonable attorney's fee, to be fixed by the court, and the damages and fee shall be deemed based on tortious conduct and enforceable accordingly.

History. Acts 1973, No. 144, § 6; A.S.A. 1947, § 34-2124.

CASE NOTES

Damages.

In an action for replevin of a valuable automobile, the award of double damages and of an attorney's fee was error where there was no proof of willful and knowing

damage to the car. *Akins v. Pierce*, 263 Ark. 15, 563 S.W.2d 406 (1978).

Cited: *Garogian v. Medlock*, 592 F.2d 997 (8th Cir. 1979).

18-60-804. Petition for recovery of personal property.

(a) In all cases in this state wherein a party claims a right of possession of property in the possession of another, the party may apply to the circuit court or the district court for issuance of an order of delivery of the property. The application shall be by petition, signed by the party or his or her attorney, and shall set forth the reasons the issuance of the order of delivery is necessary.

(b) The petition may be presented to the circuit judge, who is empowered to hear it in any county of the district he or she serves, and he or she may issue an order giving notice of hearing to be held in any county in his or her district.

(c) The petition may be brought in the district court at the election of the party so filing, and the district court shall have authority to give notice and hear the petition in the same manner as the circuit court.

(d) If the petition recites facts which, if established by proof, support the existence of a right of possession in the petitioner, an order shall be issued, directing the party against whom the order of delivery is sought to appear before the judge issuing the order and show cause why the order of delivery should not be issued and the property seized and delivered to the petitioner.

History. Acts 1973, No. 144, § 1; A.S.A. 1947, § 34-2119.

RESEARCH REFERENCES

ALR. Action in Replevin for Recovery of Dog or Cat. 85 A.L.R.6th 429.
U. Ark. Little Rock L. Rev. Annual Survey of Caselaw, Property Law, 26 U. Ark. Little Rock L. Rev. 965.

CASE NOTES

ANALYSIS

Applicability.
 Jurisdiction.

Applicability.

Sections 18-60-804 — 18-60-808 do not apply to attachments; they apply only to actions in which the plaintiff claims a right to possession of property in possession of another, which would usually, if not always, be a replevin suit. Hackworth v. First Nat'l Bank, 265 Ark. 668, 580 S.W.2d 465 (1979).

Jurisdiction.

Complaint which alleged that defendant possessed title to a vehicle valued at

\$3,900 which she obtained under divorce decree and which was being unlawfully detained was a replevin action properly within the jurisdiction of the county circuit court, and, as a consequence, a writ of prohibition did not lie. Bonnell v. Smith, 322 Ark. 141, 908 S.W.2d 74 (1995).

The chancery court had jurisdiction to order the delivery of personal property pledged on a promissory note in an action for foreclosure of real property and replevin of the personal property. Burns v. First Nat'l Bank, 336 Ark. 406, 985 S.W.2d 747 (1999).

Cited: Bank of Yellville v. Scott, 113 B.R. 516 (Bankr. W.D. Ark. 1990).

18-60-805. Notice of hearing.

(a) The order to appear and show cause why the order of delivery should not be issued shall permit a reasonable time for the party against whom it is directed to appear. It shall state the place and time the hearing shall be held.

(b)(1)(A) If served at the same time the summons and complaint are served, it may state with generality the nature of the action, the purpose of the hearing, and the consequences of nonappearance.

(B) If served after the summons and complaint, and separately therefrom, it shall refer to the complaint and, in addition to the foregoing, specifically describe the property to be seized if the petition is granted.

(2) In either event, the order shall inform the party against whom it is directed that civil and criminal penalties may be assessed if the property is willfully damaged, concealed, or removed from the court's jurisdiction, or if the party refuses to release the property to the officer designated to serve the order of delivery.

History. Acts 1973, No. 144, § 2; A.S.A. 1947, § 34-2120.

CASE NOTES

Applicability.

Sections 18-60-804 — 18-60-808 do not apply to attachments; they apply only to actions in which the plaintiff claims a right to possession of property in posses-

sion of another, which would usually, if not always, be a replevin suit. *Hackworth v. First Nat'l Bank*, 265 Ark. 668, 580 S.W.2d 465 (1979).

18-60-806. Hearing.

(a) At any hearing held on an application for an order of delivery, the petitioner shall be required to present prima facie evidence that the petitioner has the right of immediate possession of the property.

(b) If the party against whom the order of delivery is sought should fail to appear in response to the notice, the petitioner shall be required to offer the same proof necessary to secure a default judgment.

(c) If the court decides that the order of delivery should issue, an order shall be entered accordingly.

History. Acts 1973, No. 144, § 3; A.S.A. 1947, § 34-2121.

CASE NOTES

ANALYSIS

Applicability.
Evidence.

Applicability.

Sections 18-60-804 — 18-60-808 do not apply to attachments; they apply only to actions in which the plaintiff claims a right to possession of property in possession of another, which would usually, if not always, be a replevin suit. *Hackworth v. First Nat'l Bank*, 265 Ark. 668, 580 S.W.2d 465 (1979).

Evidence.

The replevin statute clearly does not require that the circuit court permit extensive evidentiary development of a defense of usury alleged in a conclusory fashion, without any statement of specific facts, when the alleged usury does not appear on the face of the contract and the required written objections do not set out the particular facts and circumstances which rendered the contract usurious. *Girley v. Wood*, 258 Ark. 408, 525 S.W.2d 454 (1975).

18-60-807. Immediate appearance — Impounding of property.

If the petitioner for an order of delivery, after otherwise complying with the requirements for issuance thereof, shall present evidence to the court that there is genuine danger that the property sought under the order will be removed from the court's jurisdiction, damaged,

concealed, or otherwise jeopardized, the court shall have the power to direct the immediate appearance of the party having possession thereof or, if the party cannot be immediately served but the property can be located, to direct that the property be taken and impounded pending further hearing, in which event it shall be deemed in custodia legis, subject to possession by neither party without further order of the court.

History. Acts 1973, No. 144, § 4; A.S.A. 1947, § 34-2122.

CASE NOTES

Applicability.

Sections 18-60-804 — 18-60-808 do not apply to attachments; they apply only to actions in which the plaintiff claims a right to possession of property in possession of another, which would usually, if not

always, be a replevin suit. *Hackworth v. First Nat'l Bank*, 265 Ark. 668, 580 S.W.2d 465 (1979).

Cited: *McCune v. Brown*, 8 Ark. App. 51, 648 S.W.2d 811 (1983).

18-60-808. Alternative procedure.

(a) In lieu of the procedure set forth in this section and §§ 18-60-801 — 18-60-807, at the time the complaint is filed and summons issued, a petitioner may obtain a notice issued by the clerk of the court in which the proceeding is filed. The notice shall be served with the complaint and summons and shall notify the defendant that an order of delivery of the property described in the complaint is sought and that if any objection is made to issuance of the order of delivery it must be in the form of a written response, filed within five (5) days of service of the summons and complaint, excluding Sundays and legal holidays, with a copy served on the plaintiff's attorney.

(b)(1) In the event no written objection is filed and served within the five-day period, the clerk shall, upon the request of the plaintiff or his or her attorney, issue the writ forthwith.

(2) In the event a defendant files a written objection within the five-day period specified, the clerk shall, at the request of either party, set the matter for hearing before the circuit judge as promptly as the business of the judge shall permit.

(c) At the hearing the judge shall proceed in the manner specified in § 18-60-806.

History. Acts 1973, No. 144, § 5; A.S.A. 1947, § 34-2123.

CASE NOTES

Applicability.

Sections 18-60-804 — 18-60-808 do not apply to attachments; they apply only to actions in which the plaintiff claims a

right to possession of property in possession of another, which would usually, if not always, be a replevin suit. *Hackworth v. First Nat'l Bank*, 265 Ark. 668, 580 S.W.2d

465 (1979).

18-60-809. Replevin.

The plaintiff in an action to recover the possession of specific personal property, at the commencement of the action or at any time before judgment, may claim the immediate delivery of the property, as provided in §§ 18-60-810 — 18-60-822.

History. Civil Code, § 202; C. & M. Dig., § 8639; Pope's Dig., § 11372; A.S.A. 1947, § 34-2101.

CASE NOTES

ANALYSIS

Burden of Proof.
Election of Remedies.

Burden of Proof.

The burden is on the plaintiff in a replevin action to prove that he is owner and entitled to the possession of the items in litigation. *Williams v. Harrell*, 226 Ark. 115, 288 S.W.2d 321 (1956).

Election of Remedies.

Since the secured party was entitled to self-help under § 4-9-503, and the self-help and replevin statutes are alternative

methods for obtaining possession of collateral, the secured party was not required by his initial election of the judicial process to pursue that remedy to a conclusion if possession can in the meantime be otherwise obtained. *McIlroy Bank & Trust v. Seven Day Bldrs. of Ark., Inc.*, 1 Ark. App. 121, 613 S.W.2d 837 (1981).

Cited: *Ward v. Worthington*, 33 Ark. 830 (1878); *Spear v. Arkansas Nat'l Bank*, 111 Ark. 29, 163 S.W. 508 (1914); *Williams v. Harrell*, 226 Ark. 115, 288 S.W.2d 321 (1956); *McCune v. Brown*, 8 Ark. App. 51, 648 S.W.2d 811 (1983); *Bank of Yellville v. Scott*, 113 B.R. 516 (Bankr. W.D. Ark. 1990).

18-60-810. Affidavit for replevin.

(a) An order for the delivery of property to the plaintiff shall be made by the clerk when there is filed in his or her office an affidavit of the plaintiff, or of someone in his or her behalf, showing:

(1) A particular description of the property claimed;
(2) Its actual value and the damages which the affiant believes the plaintiff ought to recover for the detention thereof;

(3) That the plaintiff is the owner of the property or has a special ownership or interest therein, stating the facts in relation thereto, and that he or she is entitled to the immediate possession of the property;

(4) That the property is wrongfully detained by the defendant, with the alleged cause of the detention thereof, according to the best knowledge, information, and belief of the affiant;

(5) That it has not been taken for a tax or fine against the plaintiff, or under any order or judgment of a court against him or her, or seized under an execution or attachment against his or her property, or, if so seized, that it is by statute exempt from seizure;

(6) That the plaintiff's cause of action has accrued within three (3) years; and

(7) When the action is brought to recover property taken under an execution, the fact of the taking and the nature of the process under which it was done.

(b) When the delivery of several articles of property is claimed, the affidavit must state the value of each.

History. Civil Code, §§ 203, 204; Acts 1871, No. 48, § 1 [203], p. 219; 1887, No. 29, § 1, p. 31; C. & M. Dig., §§ 8640, 8641; Pope's Dig., §§ 11373, 11374; A.S.A. 1947, §§ 34-2102, 34-2103.

CASE NOTES

ANALYSIS

Affidavit.

- Amendment.
- Description of Property.
- In Relation to Complaint.
- Objections.
- Statement of Value.

Answer.

Dismissal.

Exempt Property.

Jurisdiction.

Limitation of Actions.

Order of Delivery.

Proof.

Right to Seek Replevin.

—Attachment.

—Conditional Sales.

—Crops.

—Mingled Goods.

—Tax Sales.

Title and Right of Possession.

Affidavit.

The affidavit is merely a prerequisite to the issuance of the writ and is in no manner connected with the merits of the cause and its truth cannot be contested by plea. *Payne v. Bruton*, 10 Ark. 53 (1849).

An affidavit in a replevin case made by the plaintiff is not relevant to impeach him where he does not deny making it and it does not contradict his testimony. *Jenkins v. Quick*, 105 Ark. 467, 151 S.W. 1021 (1912).

It is only when the plaintiff desires the possession or delivery of the property prior to the judgment that he is required to file an affidavit in compliance with this section. *Climer v. Aylor*, 123 Ark. 510, 185 S.W. 1097 (1916).

—Amendment.

The affidavit may be amended in the circuit court on appeal from a justice's

court to enlarge the damages claimed. *Hanf v. Ford*, 37 Ark. 544 (1881).

Affidavit is subject to amendment. *Chapman v. Claybrook*, 173 Ark. 705, 293 S.W. 43 (1927).

—Description of Property.

The affidavit must describe the property in such a manner as to identify it. *Hawes v. Robinson*, 44 Ark. 308 (1884).

—In Relation to Complaint.

No complaint need be filed in the circuit court on appeal from a justice's court when the plaintiff's affidavit contains a statement of the facts constituting the cause of action. *Hanner v. Bailey*, 30 Ark. 681 (1875).

The affidavit is not part of the complaint. *Donnelly v. Wheeler*, 34 Ark. 111 (1879).

The office of the affidavit is to procure the order of delivery. When that is accomplished it has performed its office as an affidavit, and in justice of the peace court serves as a complaint. *Hawes v. Robinson*, 44 Ark. 308 (1884).

It is not essential in an action of replevin in a justice's court that plaintiff file a complaint, but an affidavit complying with this section is necessary to obtain an order of delivery. *Chapman v. Claybrook*, 173 Ark. 705, 293 S.W. 43 (1927).

—Objections.

Affidavit must be objected to before trial. *Thomas v. Owen*, 178 Ark. 93, 10 S.W.2d 29 (1928).

—Statement of Value.

Failure to show separate values is not ground for dismissal when the aggregate value is stated. *Chapman v. Claybrook*, 173 Ark. 705, 293 S.W. 43 (1927).

In suit to replevin personal property wherein complaint did not allege value of

property sought, but in which affidavit set forth a value of property, plaintiff was not limited in recovery to the amount set forth in the affidavit but could recover amount developed by the evidence. *Smith v. Smith*, 220 Ark. 263, 247 S.W.2d 197 (1952).

Answer.

It is not necessary to have a written answer in justice court or in circuit court on appeal. *Texas & St. Louis Ry. v. Hall*, 44 Ark. 375 (1884).

Dismissal.

The dismissal of an action of replevin before trial and a return of the property to the defendant is not a bar to the maintenance of another suit. *Martin v. Hodge*, 47 Ark. 378, 1 S.W. 694 (1886).

Exempt Property.

Replevin will not lie for property claimed as exempt until the claim for exemption is made in the statutory method. *Settles v. Bond*, 49 Ark. 114, 4 S.W. 286 (1886).

A sale under execution did not divest a debtor of the right to claim the property as exempt when the failure to claim it was unavoidable, and replevin will lie even after sale. *Thompson v. Ogle*, 55 Ark. 101, 17 S.W. 593 (1891).

Jurisdiction.

Although the affidavit is necessary to the obtaining of an order of delivery, it is not a prerequisite to the court's jurisdiction to determine the rights of property without a change of possession during the action so that defects in the affidavit did not call for a dismissal or invalidate the judgment. *Higgason v. Braswell*, 163 Ark. 348, 258 S.W. 983 (1924).

A complaint containing a sufficient description and value of the goods, alleging that the plaintiff is entitled to possession and that the defendant is in unlawful possession, is sufficient to give the court jurisdiction over the subject matter. *Feldman v. Feldman*, 171 Ark. 1097, 287 S.W. 384 (1926).

Limitation of Actions.

Three years is the limitation in actions of replevin. *Phipps v. Martin*, 33 Ark. 207 (1878).

The failure of an affidavit to replevin, to state that the plaintiff's cause of action accrued within the period of limitation, is

not ground for quashing the writ. *Higgason v. Braswell*, 163 Ark. 348, 258 S.W. 983 (1924).

Order of Delivery.

Failure to issue order of delivery does not affect the nature of the suit. *Eaton v. Langley*, 65 Ark. 448, 47 S.W. 123 (1898).

The affidavit must be filed before an order of delivery can issue. *Gates v. Bennett*, 33 Ark. 475 (1878); *Hawes v. Robinson*, 44 Ark. 308 (1884); *Schattler v. Heisman*, 85 Ark. 73, 107 S.W. 196 (1908); *Spear v. Arkansas Nat'l Bank*, 111 Ark. 29, 163 S.W. 508 (1914).

Proof.

Proof of plaintiff's possession and a wrongful taking from him, without more, is sufficient to maintain replevin for the property, though it appears that he intends an unlawful disposition of it when recovered. *Martin v. Hodge*, 47 Ark. 378, 1 S.W. 694 (1886).

It is unnecessary in replevin to prove a demand for the property before the suit if the defendant's answer has set up title in himself showing that a demand would have been futile to induce a surrender of the property. *Triplett v. Rugby Distilling Co.*, 66 Ark. 219, 49 S.W. 975 (1899).

Right to Seek Replevin.

A trustee may maintain replevin for the trust property, but the beneficiaries in the trust cannot. *Gates v. Bennett*, 33 Ark. 475 (1878).

One tenant in common cannot maintain replevin against cotenant for his part of common crop unless there has been a division of it, consummated by an assignment and appropriation of a part to each. *Ward v. Worthington*, 33 Ark. 830 (1878).

One wrongfully detaining property, and refusing to deliver it on demand, may be sued in replevin though he has parted with possession at the time of the suit. *Harkey v. Tillman*, 40 Ark. 551 (1883); *Hamilton & Co. v. Ford*, 46 Ark. 245 (1885).

The owner of timber which has been taken and converted by a trespasser into crossties may recover the ties or their value from the trespasser or his vendee with or without notice. *McKinnis v. Little Rock, Miss. River & Tex. Ry.*, 44 Ark. 210 (1884); *Stotts v. Brookfield*, 55 Ark. 307, 18 S.W. 179 (1892).

Constable may bring replevin for property levied upon. *Jetton v. Tobey*, 62 Ark. 84, 34 S.W. 531 (1896).

Replevin held not to lie. *Hodges v. Nall*, 66 Ark. 135, 66 Ark. 139, 49 S.W. 352 (1899).

Replevin will not lie against officer levying under regular execution, though based on void judgment. *Emerson v. Hopper*, 94 Ark. 384, 127 S.W. 467 (1910).

Replevin held maintainable. *Oldham v. Melton*, 205 Ark. 240, 168 S.W.2d 387 (1943).

—Attachment.

The owner of property seized under attachment against another may maintain replevin. *Willis v. Reinhardt*, 52 Ark. 128, 12 S.W. 241 (1889).

Replevin lies where property is seized under specific attachment to which it is not subject. *Mills v. Pryor*, 65 Ark. 214, 45 S.W. 350 (1898).

—Conditional Sales.

Where there is an agreement that the title shall remain in the vendor until property is paid for, no title vests in the vendee until payment, and upon his failure to pay at maturity, the vendor may maintain replevin for the property. *Ferguson v. Hetherington*, 39 Ark. 438 (1882).

When the passing of title is conditioned upon payment, the vendor may maintain replevin without returning notes executed by the purchaser for payment. *Kirby v. Tompkins*, 48 Ark. 273, 3 S.W. 363 (1886).

Property sold with title conditioned upon payment and with a restriction on use until final payment, a breach of the restriction worked a forfeiture and the vendor could maintain replevin without a demand for the property before suit. *Faisst v. Waldo*, 57 Ark. 270, 21 S.W. 436 (1893).

—Crops.

A landlord's lien will not sustain replevin for the crop. *Bell v. Matheny*, 36 Ark. 572 (1880); *Knox v. Hellums*, 38 Ark. 413 (1881).

The mortgagee of a tenant's crop cannot maintain replevin for the crop without paying the rent. *Roth & Co. v. Williams*, 45 Ark. 447 (1885).

Replevin does not lie on behalf of mortgagee of sharecropper's undivided interest in crop. *Titsworth v. Frauenthal*, 52 Ark. 254, 12 S.W. 498 (1889); *Moseley v.*

Cheatham, 62 Ark. 133, 34 S.W. 543 (1896).

—Mingled Goods.

A mortgage for a certain number of bales out of a crop of cotton is uncertain in description, and until separation or designation of the specific property, no action of replevin can be maintained for it. *Person v. Wright & Montgomery*, 35 Ark. 169 (1879).

Replevin cannot be maintained for cotton mixed in the same bale with defendant's. *McKennon v. May*, 39 Ark. 442 (1882).

Replevin cannot be maintained for a mass of cotton in which the plaintiff's has been innocently mixed; nor for an undivided share of the mass; it must be first separated and capable of identification. *Hart v. Morton*, 44 Ark. 447 (1884).

Replevin will lie for goods innocently mingled if they are of the same kind, quality and value and separation can be made without injury. *Rust Land & Lumber Co. v. Isom*, 70 Ark. 99, 66 S.W. 434 (1902).

—Tax Sales.

Subdivision (a)(5) of this section deprives the original owner of no remedy against a purchaser at an illegal tax sale. *Crowell v. Barham*, 57 Ark. 195, 21 S.W. 33 (1893).

Title and Right of Possession.

Title, general or special, and a right to immediate possession are both necessary to maintain replevin. *Thatcher v. Franklin*, 37 Ark. 64 (1881).

Replevin cannot be maintained upon a title acquired after suit. *McKennon v. May*, 39 Ark. 442 (1882).

Possession of logs under claim of title was held presumptive of ownership. *Oxley Stave Co. v. Staggs*, 59 Ark. 370, 27 S.W. 241 (1894).

To maintain replevin for chattels, the plaintiffs must not only have title, general or special in them, but must be entitled to immediate possession thereof. *Carpenter v. Glass*, 67 Ark. 135, 53 S.W. 678 (1899).

Plaintiff's contractual obligation to repurchase a conditional sales contract for a truck tractor from the bank and the permission of the bank to attempt to recover the tractor met the special ownership interest and immediate right to possession requirements of Arkansas replevin law.

Garoogian v. Medlock, 592 F.2d 997 (8th Cir. 1979). Bank of N.E. Ark., 259 Ark. 690, 536 S.W.2d 693 (1976); Olmstead v. Logan, 298 Ark. 421, 768 S.W.2d 26 (1989).
Cited: Affiliated Food Stores, Inc. v.

18-60-811. Order for delivery of property.

(a) The order for the delivery of the property to the plaintiff shall be addressed and delivered, with a copy thereof, to the sheriff. It shall state the names of the parties to the action and the court in which the action is brought and direct the sheriff to take the property, describing it and stating its value as in the affidavit of the plaintiff, and deliver it to him or her, to make return of the order on a day to be named therein and to summon the defendant to appear on this day in the court and answer the plaintiff in the premises.

(b)(1) If the plaintiff shall file an additional affidavit that he or she believes the property has been concealed, removed, or disposed of in any way with intent to defeat the plaintiff's action, the clerk or magistrate shall insert a clause commanding the sheriff, or other officer, that if the property mentioned in the order cannot be had, to take the body of the defendant, so that he or she appear at the return day of the order to answer the premises.

(2) The order shall be made returnable as an order of arrest is directed to be returned.

History. Civil Code § 205; Acts 1875 Dig., § 8642; Pope's Dig., § 11375; A.S.A. (Adj. Sess.), No. 86, § 1, p. 165; C. & M. 1947, § 34-2104.

CASE NOTES

ANALYSIS

Arrest.
 Property Seized.

Arrest.

An arrest cannot be made if the additional affidavit is not filed. Keebey's, Inc. v. Williams, 183 Ark. 964, 39 S.W.2d 731 (1931).

In order to obtain arrest of defendant under this section a bond must be executed as required by former § 16-109-

103, the bond authorized by § 18-60-812 not being sufficient for such purpose. Keebey's, Inc. v. Williams, 183 Ark. 964, 39 S.W.2d 731 (1931).

Property Seized.

An order directing the officer to replevy bales of cotton gives no authority to seize seed cotton. Chandler v. Smith, 34 Ark. 527 (1879).

Cited: Olmstead v. Logan, 298 Ark. 421, 768 S.W.2d 26 (1989).

18-60-812. Bond.

(a) The order shall not be complied with by the sheriff until there has been executed in his or her presence, by one (1) or more sufficient sureties of the plaintiff, a bond to the defendant, to the effect that the plaintiff shall duly prosecute the action and that he or she shall perform the judgment of the court therein by returning the property, if a return thereof shall be adjudged, and by paying any sums of money adjudged against him or her in the action, not exceeding double the value of the property and the costs of the action.

(b) When the action is brought against a sheriff or other officer to recover possession of property taken by him or her under an execution against a person other than the plaintiff, the bond provided for in subsection (a) of this section shall be to the effect that the plaintiff shall duly prosecute the action and that he or she shall perform the judgment of the court therein by returning the property, if a return thereof shall be adjudged, and by paying to the defendant or to the plaintiff in the execution, as may be directed by the court, any sums of money adjudged against the plaintiff in the action, not exceeding double the value of the property and the costs of the action.

History. Civil Code, §§ 206, 207; C. & M. Dig., §§ 8643, 8646; Pope's Dig., § 11376, 11379; A.S.A. 1947, §§ 34-2105, 34-2106.

Cross References. Exemption of banks and savings and loan institutions from bond requirements, § 23-32-301 et seq.

CASE NOTES

ANALYSIS

Form.
Noncompliance.
Officer's Bond.
Order of Delivery.
Sureties.

Form.

The section does not prescribe any set form of words for a delivery bond and conditions named therein not required by the section may, when severable, be treated as surplusage. *O'Brien v. Alford*, 114 Ark. 257, 169 S.W. 774 (1914).

Noncompliance.

The solvency of the plaintiff will not dispense with the sureties on the bond as required by this section; and if the officer proceeds under a bond without them, he is liable as a trespasser. *Wilson v. Williams*, 52 Ark. 360, 12 S.W. 780 (1889).

Officer's Bond.

A complaint in an action on a constable's bond was defective in failing to allege that he had executed bond as required by this section. *Southern Orchard Planting Co. v. Gore*, 83 Ark. 78, 102 S.W. 709 (1907).

Order of Delivery.

An order of delivery may not be issued unless the plaintiff makes affidavit and executes the required bond, but failure to execute an order of delivery does not affect the nature of the action. *Morgan v. Hess*, 210 Ark. 207, 194 S.W.2d 871 (1946).

Sureties.

One who signs a replevin bond as surety becomes a party to the action, and a judgment against him is not without jurisdiction even though the bond was not returned as required in § 18-60-816. *Glenn v. Porter*, 68 Ark. 320, 57 S.W. 1109 (1900).

One who signs a delivery bond in a replevin suit becomes a party to the suit and judgment may be rendered against him thereon. *Walker v. Files*, 94 Ark. 453, 127 S.W. 739 (1910).

Cited: *Schneider v. Coker*, 115 Ark. 490, 171 S.W. 898 (1914); *Conlee v. Love*, 178 Ark. 238, 10 S.W.2d 372 (1928); *Smith v. Smith*, 220 Ark. 263, 247 S.W.2d 197 (1952); *Hixon v. Deering*, 249 Ark. 701, 460 S.W.2d 748 (1970); *Mack Trucks of Arkansas, Inc. v. Yarbrough*, 251 Ark. 618, 473 S.W.2d 889 (1971); *Frazier v. Firestone Stores of Hot Springs, Inc.*, 251 Ark. 984, 476 S.W.2d 4 (1972).

18-60-813. Execution of order.

(a) The sheriff shall execute the order by taking the property therein mentioned, if it is found in the possession of the defendant, or his or her agent, or of any other person who obtained possession thereof from the

defendant, directly or indirectly, after the order was placed in the sheriff's hands.

(b) The sheriff shall also deliver a copy of the order to the defendant, or to the person from whose possession the property is taken, or, if neither can be found, leave it at the usual place of abode of either, with some person of the age of at least sixteen (16).

History. Civil Code, § 208; C. & M. Dig., § 8647; Pope's Dig., § 11380; A.S.A. 1947, § 34-2107.

CASE NOTES

Transfer of Possession.

A party in possession of goods cannot avoid liability by transfer to another. *Washington v. Love*, 34 Ark. 93 (1879).

18-60-814. Orders directed to other counties.

(a) At any time before judgment an order may be directed to any other county for the delivery of the property claimed.

(b) Several orders may issue at the same time, or successively, at the option of the plaintiff, but only one (1) of the orders shall be taxed in the costs, unless otherwise ordered by the court.

History. Civil Code, § 214; C. & M. Dig., § 8652; Pope's Dig., § 11385; A.S.A. 1947, § 34-2114.

18-60-815. Disposition of property replevied.

If the affidavit of the plaintiff states that the property was taken under an execution, the sheriff shall deliver it to the plaintiff. In every other case the sheriff shall retain the property in his or her possession for two (2) days, unless the bond mentioned in § 18-60-816 shall be sooner executed.

History. Civil Code, § 209; C. & M. Dig., § 8648; Pope's Dig., § 11381; A.S.A. 1947, § 34-2108.

CASE NOTES

Sheriff's Liability.

In the absence of bond by defendant, sheriff is in legal custody of property until it is turned over to plaintiff in replevin,

and sheriff is responsible for loss unless he can show that it was not the result of his negligence. *Hearn v. Ayres*, 77 Ark. 497, 92 S.W. 768 (1906).

18-60-816. Redelivery bond.

(a)(1) Within two (2) days after the taking of the property by the sheriff, in the case in which the property was not taken under an execution, the defendant or anyone for him or her may cause a bond to be executed to the plaintiff in the presence of the sheriff, by one (1) or more sufficient sureties, in double the value of the property, to the effect that the defendant shall perform the judgment of the court in the actions.

(2) Thereupon the sheriff shall restore the property to the defendant or to the person in whose possession it was found.

(b)(1) If the bond is not executed within the time provided in subsection (a) of this section, the sheriff shall deliver the property to the plaintiff.

(2) The sheriff shall return the bonds with the order.

History. Civil Code, § 210; C. & M. Dig., § 8649; Pope's Dig., § 11382; A.S.A. 1947, § 34-2109.

CASE NOTES**ANALYSIS**

Amount.
Appeal.
Failure to Give Bond.
Jurisdiction.
Liability of Sureties.
Return.
Sufficiency.
Terms and Conditions.

Amount.

The requirement that a redelivery bond be exacted in double the value of the property involved is not one of the conditions of the bond but merely limits the amount of the sureties' liability. *McHaney v. Brown*, 183 Ark. 201, 35 S.W.2d 594 (1931).

A redelivery bond, though not executed in double the value of the property involved, is sufficient to authorize a summary judgment against the sureties. *McHaney v. Brown*, 183 Ark. 201, 35 S.W.2d 594 (1931).

Appeal.

When the defendant continues to retain property during the pendency of an appeal from a justice of the peace, the affidavit in replevin may be amended in the circuit court to enlarge the damages sustained by reason of the appeal. *Hanf v. Ford*, 37 Ark. 544 (1881).

Failure to Give Bond.

Where defendant fails to give the bond, the property remains in custody of sheriff in contemplation of law till turned over to the plaintiff. *Hearn v. Ayres*, 77 Ark. 497, 92 S.W. 768 (1906).

Dismissal of replevin action in vacation by notation on record following delivery of property to plaintiff on failure of defendant to file bond was without legal authority. *Commercial Credit Corp. v. Mackay*, 221 Ark. 226, 252 S.W.2d 819 (1952).

Defendant who was unable to procure a bond to retain possession of the property did not waive his right to recover damages for consequential losses. *Lake Village Implement Co. v. Cox*, 252 Ark. 224, 478 S.W.2d 36 (1972).

Jurisdiction.

Where an automobile was delivered to the defendant in a replevin suit upon his giving bond, the order of the chancellor transferring its custody to a third person upon the application of the defendant's surety was not in excess of the court's jurisdiction and therefore prohibition did not lie. *Henson v. Dodge*, 179 Ark. 338, 15 S.W.2d 389 (1929).

Liability of Sureties.

A surety is liable for the damages and costs of the suit as well as for return of the

property. *Morrill v. Daniel*, 47 Ark. 316, 1 S.W. 702 (1886).

The bond is liable for damages from date of the suit till verdict. *Lesser v. Norman*, 51 Ark. 301, 11 S.W. 281 (1888).

Where the defendant in replevin retained the property by executing a delivery bond, upon affirmance of an adverse judgment against him, a judgment against the sureties thereon will be entered. *Thomas v. Schaad*, 170 Ark. 797, 281 S.W. 10 (1926).

Judgment against the surety on a delivery bond in replevin should be for the value of the property in case it is not returned instead of for a greater amount than named in the bond. *J.E. McCoy & Son v. Atkins*, 172 Ark. 365, 288 S.W. 886 (1926).

Where the sheriff never restored to defendant from whom he took possession at the instance of the plaintiff, the sureties on the defendant's redelivery bond were properly released from liability after the proceeds from the sale of the truck were awarded to the plaintiff. *Mack Trucks of Arkansas, Inc. v. Yarbrough*, 251 Ark. 618, 473 S.W.2d 889 (1971).

Return.

Even though the sheriff fails to return the bond, the sureties who sign as provided in § 18-60-812 become parties to any suit that might be brought, and no further notice is required. *Glenn v. Porter*, 68 Ark. 320, 57 S.W. 1109 (1900).

Sufficiency.

Bond obtained from defendant under duress by which he agreed to return the property or pay its value held not to sus-

tain a judgment against the surety thereon as the bond did not comply with this section. *Watson v. Keebey*, 175 Ark. 527, 299 S.W. 993 (1927).

Redelivery bond obligating the defendant to perform the judgment of the court held sufficient to support summary judgment against defendant and his sureties. *McHaney v. Brown*, 183 Ark. 201, 35 S.W.2d 594 (1931).

A redelivery bond is sufficient where in all essentials it complies with this section. *McHaney v. Brown*, 183 Ark. 201, 35 S.W.2d 594 (1931).

Terms and Conditions.

The section does not prescribe a set form of words for a delivery bond, and conditions named therein, not required by the section, may, where severable, be treated as surplusage. *O'Brien v. Alford*, 114 Ark. 257, 169 S.W. 774 (1914).

One who retained the property in a replevin suit could not complain of a judgment against him on the ground that the retaining bond did not follow the precise language of the section. *Segraves v. Brooks*, 123 Ark. 261, 185 S.W. 260 (1916).

Where a delivery bond executed by the defendant was not conditioned that the defendant should perform the judgment but provided that the property should be "forthcoming and subject to the orders of the court," the sureties were discharged upon return of the property. *Rogers v. Tri-State Motor Sales Co.*, 165 Ark. 590, 265 S.W. 80 (1924).

Cited: *Bilby v. Foochs*, 90 Ark. 297, 119 S.W. 286 (1909); *Affiliated Food Stores, Inc. v. Bank of N.E. Ark.*, 259 Ark. 690, 536 S.W.2d 693 (1976).

18-60-817. Appraisement of property before taking bond.

(a) Before taking any bond, upon the suggestion of either party that the value of the property is not truly stated in the order for its delivery and where the suggestion is on the part of the defendant, on his or her producing the property to the sheriff, the sheriff shall select three (3) disinterested housekeepers to appraise the property under oath, to be administered by him or her.

(b) The housekeepers' appraisement, endorsed upon the order, shall be regarded as the value of the property in taking the bonds.

History. Civil Code, § 211; C. & M. Dig., § 8650; Pope's Dig., § 11383; A.S.A. 1947, § 34-2110.

CASE NOTES

Cited: Lake Village Implement Co. v. Cox, 252 Ark. 224, 478 S.W.2d 36 (1972).

18-60-818. Claim of third party to property.

(a)(1) If a person other than the defendant or his or her agent claims the property taken by the sheriff and delivers to the sheriff his or her affidavit that he or she is entitled to the possession thereof, the sheriff shall not be bound to keep the property or deliver it to the plaintiff unless the plaintiff shall, within two (2) days after the delivery to him or her or to his or her agent or attorney, by the sheriff, of a copy of the affidavit, indemnify the sheriff against the claim by a bond, executed by one (1) or more sufficient sureties, in double the value of the property.

(2) No claim to the property by a person other than the defendant or his or her agent shall be valid against the sheriff unless so made.

(b) The sheriff shall return the affidavit of the claimant, with his or her proceedings thereon, to the clerk's office.

History. Civil Code, § 213; C. & M. Dig., § 8651; Pope's Dig., § 11384; A.S.A. 1947, § 34-2111.

CASE NOTES

ANALYSIS

Administrator.
Judgment.

Administrator.

The general rule that in replevin the title and right to possession of the property must be determined by the status at the commencement of the action did not prohibit an administrator appointed after the commencement of the action from intervening in an action of replevin by the widow of an intestate against the heirs to recover chattels claimed by the widow as

part of her distributive share. *Lambert v. Tucker*, 83 Ark. 416, 104 S.W. 131 (1907).

Judgment.

Personal judgment rendered against an intervener for the amount of the debt in a replevin suit was void where intervener had taken possession of the chattel in controversy and given his bond therefor; the court had power only to render judgment against the intervener for the redelivery of the chattel or for the value thereof. *E.O. Barnett Bros. v. Henry*, 133 Ark. 531, 202 S.W. 707 (1918).

18-60-819. Arrest and discharge of defendant.

(a) If the property described in the order shall have been removed or concealed so that the officer cannot make delivery thereof, when the order contains a *capias* clause, the officer shall arrest the body of the defendant and hold him or her in custody in the same manner as on a *capias ad respondendum* in a personal action until the defendant shall execute the bond prescribed in subsection (b) of this section or be otherwise legally discharged.

(b) The defendant shall be entitled to be discharged from arrest at any time before final judgment had in the cause upon executing to the

officer who shall have made the arrest, with the addition of his or her name of office, a bond in a penalty of at least double the value of the property described as sworn to in the affidavit, with such security as shall be approved by the officer, conditioned that the defendant shall abide the order and judgment of the court in the action and that he or she will cause special bail to be put in, if it is required.

History. Acts 1875 (Adj. Sess.), No. 86, 8645; Pope's Dig., §§ 11377, 11378; A.S.A. §§ 2, 3, p. 165; C. & M. Dig., §§ 8644, 1947, §§ 34-2112, 34-2113.

CASE NOTES

ANALYSIS

Bond.

Enforcement of Judgment.

Wrongful Arrest.

Bond.

In view of former § 16-109-106, recovery could not be had upon a bond given under this section until a *capias ad satisfaciendum* issued with a return thereon of *non est inventus*. *Daniels v. Wagner*, 156 Ark. 198, 245 S.W. 487 (1922).

The bond is a bail bond for appearance of defendant, not the delivery of property. *Jones v. Keebey*, 159 Ark. 586, 252 S.W. 591 (1923); *Lane v. Alexander*, 168 Ark. 700, 271 S.W. 710 (1925).

It was error to render judgment against sureties on a bond for delivery of property executed while under arrest in order to

obtain release from arrest. *Watson v. Keebey*, 175 Ark. 527, 299 S.W. 993 (1927).

Enforcement of Judgment.

Although the bond executed under this section is an appearance bond, the court may act upon the person of the defendant in the enforcement of a judgment and keep him in confinement until he delivers the property or executes a bond for its delivery. *Lane v. Alexander*, 168 Ark. 700, 271 S.W. 710 (1925).

Wrongful Arrest.

If a defendant in replevin was damaged by being wrongfully arrested under this section, he cannot recover such damages in the replevin suit. *Hodges v. Nall*, 66 Ark. 135, 66 Ark. 139, 49 S.W. 352 (1899).

Cited: *Morrison v. Berry*, 170 Ark. 147, 278 S.W. 962 (1926); *Omni Holding & Dev. Corp. v. 3D.S.A.*, 356 Ark. 440, 156 S.W.3d 228 (2004).

18-60-820. Judgments generally.

(a) In an action to recover the possession of personal property, judgment for the plaintiff may be for the delivery of the property, or for the value thereof in case a delivery cannot be had, and damages for the detention.

(b) When the property has been delivered to the plaintiff and the defendant claims a return thereof, judgment for the defendant may be for the return of the property, or its value, in case a return cannot be had, and damages for the taking and withholding of the property.

History. Civil Code, § 420; C. & M. Dig., § 8654; Pope's Dig., § 11387; A.S.A. 1947, § 34-2116.

CASE NOTES

ANALYSIS

Damages for the Detention.

Exemptions.

Interest.

Recovery of Property or Its Value.

—Conditional Sales.

Sureties.

Damages for the Detention.

Where the action was one for replevin, or in the alternative, for conversion of two trucks, the expenses incurred by plaintiff in its attempts to recover possession of the trucks were proper as damages under subsection (a) of this section. *McQuillan v. Mercedes-Benz Credit Corp.*, 331 Ark. 242, 961 S.W.2d 729 (1998).

Creditor was entitled to possession of an excavator and \$45,000 in detention damages. The trial court granted relief provided for in this section by awarding the creditor possession of the excavator, as well as damages for its detention. *Williams Tractor Inc. v. Venture, LLC*, 2013 Ark. App. 354 (2013).

In a replevin action in which the trial court found that a creditor was entitled to an excavator, the debtor could not prove unjust enrichment on the part of a creditor because possession of the excavator and damages for its detention were specifically permitted by this section. *Williams Tractor Inc. v. Venture, LLC*, 2013 Ark. App. 354 (2013).

Exemptions.

Exemptions cannot be claimed against a judgment rendered under this section. *Bowser Furn. Co. v. Johnson*, 117 Ark. 496, 175 S.W. 516 (1915).

Interest.

In an action of replevin for timber cut or its value, the plaintiff was held not entitled to recover interest on the value. *Kansas City Fibre Box Co. v. F. Burkart Mfg. Co.*, 184 Ark. 704, 44 S.W.2d 325 (1931).

Recovery of Property or Its Value.

Where property sued for has been delivered by the defendant into the custody of the court, there is no necessity that a verdict for the plaintiff should assess its value, so that there could be an alternative judgment for the property or its value;

the judgment should be only for the delivery. *Harris v. Harris*, 43 Ark. 535 (1884).

The recovery of possession is the primary object of a suit in replevin; and the value of the property only in case the property itself cannot be had; and the defendant has no right, against the will of the plaintiff, to pay the judgment for its value, instead of returning the property. *Swantz v. Pillow*, 50 Ark. 200, 50 Ark. 300, 7 S.W. 167 (1887).

The fact that the plaintiff was in possession when his action was commenced, pleaded in defense in which the defendant claimed possession, did not entitle the defendant to a judgment for the property or its value. *Pyburne v. Moses*, 54 Ark. 121, 15 S.W. 84 (1891).

Successful plaintiff's right to delivery or value of property was not affected by the fact that he failed to claim a delivery of the property before judgment but ordered the sheriff to return the order of delivery without service. *Eaton v. Langley*, 65 Ark. 448, 47 S.W. 123 (1898).

Where the record showed conclusively that a judgment for delivery could not be executed, the defendant was not prejudiced by a judgment against him for its value. *Cathey v. Bowen*, 70 Ark. 348, 68 S.W. 31 (1902).

The failure of the court to render an alternative judgment was not reversible error where the form of the judgment could not be prejudicial to the party seeking to reverse it. *Bilby v. Foochs*, 90 Ark. 297, 119 S.W. 286 (1909).

The recovery of possession is the primary object of a suit in replevin and the owner cannot be required to accept its dollar value. *Pettit v. Kilby*, 232 Ark. 993, 342 S.W.2d 93 (1961).

—Conditional Sales.

In a suit to obtain possession of property sold under a conditional sales contract, judgment against the defendant and his bondsmen should be for the amount due, with credit to be given for the amount received on sale of the property. *Trice v. People's Loan & Inv. Co.*, 173 Ark. 1160, 293 S.W. 1037 (1927).

Where the buyer under conditional sales contract admitted owing a balance on the car, it was error for court to accept a verdict in favor of buyer wherein no

value of the car was found and render a judgment on such verdict. *Rebsamen Motors v. Moore*, 231 Ark. 249, 329 S.W.2d 155 (1959).

Sureties.

In an action for replevin of property sold to the defendant by plaintiff, the sureties

on plaintiff's replevin bond are not liable for payment of a judgment against plaintiff on defendant's counterclaim for breach of warranty. *Hixon v. Deering*, 249 Ark. 701, 460 S.W.2d 748 (1970).

Cited: *France v. Nelson*, 292 Ark. 219, 729 S.W.2d 161 (1987).

18-60-821. Judgment against sureties.

(a)(1) In all actions for the recovery of personal property, where the defendant has given a delivery bond as provided for by § 18-60-816, the court or jury trying the cause may render judgment against the defendant for the recovery of the property, or its value, together with all damages sustained by the detention thereof.

(2) Upon motion of the plaintiff the court or jury may also render judgment against the sureties upon the defendant's delivery bond for the value of the property and also for damages as they may be found and determined by the court or jury trying the cause.

(b) If, upon the trial of any replevin cause, judgment is given for the defendant in the action, the court or jury trying the cause may render judgment, not only against the plaintiff for the value of the property taken under the order of delivery in the case, provided it has not been surrendered to the defendant, upon bond, as provided for in § 18-60-816, together with all damages sustained by the defendant in the action, but may, upon motion of the defendant, also render judgment against the sureties upon the bond of the plaintiff, for the value of the property and all damages sustained by the defendant in the action.

History. Acts 1885, No. 12, §§ 1, 2, p. 16; C. & M. Dig., §§ 8655, 8656; Pope's

Dig., §§ 11389, 11390; A.S.A. 1947, §§ 34-2117, 34-2118.

CASE NOTES

ANALYSIS

Applicability.

Arrest of Defendant.

Liability of Surety.

Subsequent Action.

Summary Judgment.

Applicability.

This section has no application when the action is dismissed on defendant's motion for want of jurisdiction of the subject matter. *Ware v. Shoemaker-Bale Auto Co.*, 177 Ark. 227, 6 S.W.2d 285 (1928).

Arrest of Defendant.

The sureties upon a bond given pursuant to this section are not liable for the judgment rendered against the defendant, unless an execution against the body of

the defendant has been issued under § 16-109-106, and returned "not found" under § 16-109-112. *Duncan v. Owens*, 47 Ark. 388, 1 S.W. 698 (1886).

Liability of Surety.

Where a defendant in replevin gives a retaining bond, the liability of the sureties therein is limited to the value of the property in case its return cannot be had and the damages sustained by its detention. *Woodburn v. Driver*, 81 Ark. 333, 99 S.W. 384 (1907).

One who signs a delivery bond in a replevin suit becomes a party to the suit and judgment may be rendered against him thereon. *Walker v. Files*, 94 Ark. 453, 127 S.W. 739 (1910).

The surety on a plaintiff's bond in a suit in replevin is liable only when the prop-

erty has been taken by the plaintiff under the order of delivery and a judgment against the surety is not authorized when the plaintiff has secured possession some other way. *Schneider v. Coker*, 115 Ark. 490, 171 S.W. 898 (1914).

In replevin by a mortgagee for mortgaged chattels, judgment against the mortgagor is authorized in order that he may prevent foreclosure by paying the judgment, but such judgment does not affect the surety on his delivery bond. *J.E. McCoy & Son v. Atkins*, 172 Ark. 365, 288 S.W. 886 (1926).

Where cross bond was executed by defendants in replevin action, recovery for wrongful detention of property in a greater amount than claimed in the original complaint was authorized. *Isabel v. GMAC*, 192 Ark. 1125, 96 S.W.2d 1106 (1936).

In an action by a vendor for replevin of property sold to the defendant, the sureties on plaintiff's replevin bond are not liable for payment of damages against plaintiff on defendant's counterclaim for breach of warranty. *Hixon v. Deering*, 249 Ark. 701, 460 S.W.2d 748 (1970).

Where the sheriff had possession of the subject truck and never restored it to the

defendant from whom he took possession at the instance of the plaintiff, the sureties on the defendant's redelivery bond were properly released from liability after the proceeds from the sale of the truck were awarded to the plaintiff. *Mack Trucks of Arkansas, Inc. v. Yarbrough*, 251 Ark. 618, 473 S.W.2d 889 (1971).

Subsequent Action.

A delivery bond cannot be the basis of subsequent action after judgment in replevin suit. *Conlee v. Love*, 178 Ark. 238, 10 S.W.2d 372 (1928).

After the bond had merged into judgment, it could not be made the basis of a subsequent suit between the same parties for depreciation in value of the property seized during the pendency of an appeal from the judgment in the replevin suit. *Conlee v. Love*, 178 Ark. 238, 10 S.W.2d 372 (1928).

Summary Judgment.

A summary judgment may be rendered on the bond. *Dillard v. Nelson*, 78 Ark. 237, 95 S.W. 460 (1906).

A summary judgment may be rendered in the trial court against the sureties on a delivery bond. *O'Brien v. Alford*, 114 Ark. 257, 169 S.W. 774 (1914).

18-60-822. Assessment of value and damages.

In actions for recovery of specific personal property, the jury must assess the value of the property, and the damages for taking or detention, whenever, by their verdict, there will be a judgment for the recovery or return of the property.

History. Civil Code, § 362; C. & M. Dig., § 8653; Pope's Dig., § 11386; A.S.A. 1947, § 34-2115.

CASE NOTES

ANALYSIS

Instructions.
Valuation of Property.
Waiver of Objections.

Instructions.

In a replevin action, where the defense was that the action was brought before the defendant obtained possession, it was error to charge the jury to return a verdict for the property in favor of the defendant if the property was in the plaintiff's pos-

session at the institution of the suit, the defendant in such case being entitled only to costs. *Pyburne v. Moses*, 54 Ark. 121, 15 S.W. 84 (1891).

The recovery of specific personal property is the primary object of a suit in replevin and it was error to instruct the jury that, if they found for the defendant on his counterclaim, they should include in his damages for the wrongful taking, in addition to return of the wrongfully replevied property, the down payment he had made to plaintiff on the purchase of

the property. *Lake Village Implement Co. v. Cox*, 249 Ark. 733, 461 S.W.2d 108 (1970).

Valuation of Property.

In ascertaining the separate value of each article of goods replevied from a sheriff who had seized them under an attachment, it is admissible for the jury to take to the jury room the invoice of the goods taken by the sheriff when he took possession of them, where the invoice is proved to be correct in description and value. *Hickman v. Ford & Co.*, 43 Ark. 207 (1884).

A verdict assessing the value of the "property taken" without describing it is sufficient if reference to the complaint makes certain what property is meant. *Hobbs v. Clark*, 53 Ark. 411, 14 S.W. 652 (1890).

Verdict that property or its value be returned, without fixing the value, is defective. *Keller v. Sawyer*, 104 Ark. 375, 149 S.W. 334 (1912).

Where the buyer under conditional sales contract admitted owing a balance on the car, it was error for the court to accept a verdict in favor of buyer wherein no value of the car was found and render a judgment on such verdict. *Rebsamen Mo-*

tors v. Moore, 231 Ark. 249, 329 S.W.2d 155 (1959).

Waiver of Objections.

A verdict in solido when separate articles are replevied is waived, unless objected to before the discharge of the jury. *Hobbs v. Clark*, 53 Ark. 411, 14 S.W. 652 (1890).

While the proper practice in replevin is for the verdict to value separately each article, the right to possession of which is determined by the judgment, so that the judgment may be satisfied by the return of such property, an objection to a verdict which does not thus value the property may be waived and is waived unless objected to before the discharge of the jury. *Neal v. Cole*, 144 Ark. 547, 223 S.W. 18 (1920).

The statute requiring the separate valuation of each specific article replevied may be waived and will be held to be waived where the property replevied is treated as parts of a single unit. *Taylor v. Walker*, 149 Ark. 134, 231 S.W. 550 (1921).

Verdict which did not conform to the statute was permitted to stand, since there was no objection thereto. *Garrett v. McAtee*, 195 Ark. 1123, 115 S.W.2d 1092 (1938).

SUBCHAPTER 9 — VACATING PUBLIC UTILITY EASEMENTS

SECTION.

- 18-60-901. Petition to vacate.
- 18-60-902. Notice.
- 18-60-903. Hearing — Order — Appeal.

SECTION.

- 18-60-904. Effect of order — Removal of property.

Cross References. Public utilities, § 14-199-101 et seq.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey — Property, 10 U. Ark. Little Rock L.J. 605.

18-60-901. Petition to vacate.

(a) The owners of realty that is encumbered by a public utility easement and located outside the boundaries of any city or town may petition the county court to vacate the public utility easement.

(b) The petition shall clearly describe the easement.

History. Acts 1987, No. 494, § 1.

18-60-902. Notice.

(a) Upon receipt of the petition, the county clerk shall promptly give notice by publication at least one (1) time a week for at least two (2) consecutive weeks in some newspaper having a general circulation within the county.

(b)(1) The notice shall state that the petition has been filed and that on a certain day named in the notice the county court will hear all persons desiring to be heard on the question of whether the public utility easement should be vacated.

(2) The notice shall give the names of property owners signing the petition and shall clearly describe the easement.

(c) If the easement is in favor of a specific utility, the owners of the realty must give actual notice to that utility as a condition precedent to vacating the easement.

History. Acts 1987, No. 494, § 2.

18-60-903. Hearing — Order — Appeal.

(a) At the hearing, the county court shall hear all interested parties and, if the court determines that the easement has not been used by the public utility for a period of at least five (5) years and that vacating the easement would not be against the interest of the public, the court shall enter an order vacating the easement and establishing the amount of just compensation for the easement.

(b) The finding and order of the county court shall be conclusive on all parties having or claiming any rights or interest in the easement.

(c)(1) Within thirty (30) days from the entry of the county court order, an appeal may be taken to the circuit court, where a trial de novo without a jury shall be conducted by the judge of the circuit court.

(2) An appeal may be taken from the circuit court to the Supreme Court within thirty (30) days from the entry of the order.

(d) The cost of the publication of the notice, the cost of recording of the orders, and the court costs shall be paid by the petitioners, except that the court cost necessitated by an appeal shall be paid by the party or parties who unsuccessfully contest the petition.

History. Acts 1987, No. 494, § 3.

18-60-904. Effect of order — Removal of property.

(a) When the county court issues an order vacating a public utility easement, the ownership of the real property through which the easement extends shall cease to be burdened with the easement.

(b) The public utilities shall remove their property located on or beneath the realty subject to the easement within ninety (90) days after the issuance of the order vacating the easement, or the property shall be forfeited to the owners of the realty.

History. Acts 1987, No. 494, § 4.

SUBCHAPTER 10 — UNIFORM PARTITION OF HEIRS PROPERTY ACT

SECTION.	SECTION.
18-60-1001. Short title.	18-60-1010. Open-market sale, sealed bids, or auction.
18-60-1002. Definitions.	18-60-1011. Report of open-market sale.
18-60-1003. Applicability — Relation to other law.	18-60-1012. Uniformity of application and construction.
18-60-1004. Service — Notice by posting.	18-60-1013. Relation to Electronic Signatures in Global and National Commerce Act.
18-60-1005. Commissioners.	18-60-1014. Effective date.
18-60-1006. Determination of value.	
18-60-1007. Cotenant buyout.	
18-60-1008. Partition alternatives.	
18-60-1009. Considerations for partition in kind.	

Effective Dates. Acts 2015, No. 107, § 4: Jan. 1, 2016.

18-60-1001. Short title.

This subchapter may be cited as the “Uniform Partition of Heirs Property Act”.

History. Acts 2015, No. 107, § 1.

18-60-1002. Definitions.

In this subchapter:

(1)(A) “Ascendant” means an individual who precedes another individual in lineage, in the direct line of ascent from the other individual.

(B) “Ascendant” includes an adoptive parent and his or her ascendants.

(2) “Collateral” means an individual who is related to another individual under § 28-9-214 but who is not the other individual’s ascendant or descendant.

(3)(A) “Descendant” means an individual’s child, grandchild, and any other, however remotely related to such an individual, who is in a direct line of descent from him or her, including lineal descendants and excluding ascendants and collaterals.

(B) “Descendant” includes an adopted child and his or her descendants.

(4) “Determination of value” means a court order determining the fair market value of heirs property under § 18-60-1006 or § 18-60-1010 or adopting the valuation of the property agreed to by all cotenants.

(5) “Heirs property” means real property held in tenancy in common which satisfies all of the following requirements as of the filing of a partition action:

(A) there is no agreement in a record binding all the cotenants which governs the partition of the property;

(B) one or more of the cotenants acquired title from a relative, whether living or deceased; and

(C) any of the following applies:

(i) 20 percent or more of the interests are held by cotenants who are relatives;

(ii) 20 percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased; or

(iii) 20 percent or more of the cotenants are relatives.

(6) “Partition by sale” means a court-ordered sale of the entire heirs property, whether by auction, sealed bids, or open-market sale conducted under § 18-60-1010.

(7) “Partition in kind” means the division of heirs property into physically distinct and separately titled parcels.

(8) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(9) “Relative” means an ascendant, descendant, or collateral or an individual otherwise related to another individual by marriage or law of this state other than this subchapter.

History. Acts 2015, No. 107, § 1.

18-60-1003. Applicability — Relation to other law.

(a) This subchapter applies to partition actions filed on or after January 1, 2016.

(b) In an action to partition real property under § 18-60-401 et seq., the court shall determine whether the property is heirs property. If the court determines that the property is heirs property, the property must be partitioned under this subchapter unless all of the cotenants otherwise agree in a record.

(c) This subchapter supplements § 18-60-401 et seq. and, if an action is governed by this subchapter, replaces provisions of § 18-60-401 et seq. that are inconsistent with this subchapter.

History. Acts 2015, No. 107, § 1.

18-60-1004. Service — Notice by posting.

(a) This subchapter does not limit or affect the method by which service of a complaint in a partition action may be made.

(b) If the plaintiff in a partition action seeks notice by publication and the court determines that the property may be heirs property, the plaintiff, not later than 10 days after the court's determination, shall post and maintain while the action is pending a conspicuous sign on the property that is the subject of the action. The sign must state that the action has commenced and identify the name and address of the court and the common designation by which the property is known. The court may require the plaintiff to publish on the sign the name of the plaintiff and the known defendants.

History. Acts 2015, No. 107, § 1.

18-60-1005. Commissioners.

If the court appoints commissioners pursuant to § 18-60-401 et seq., each commissioner, in addition to the requirements and disqualifications applicable to commissioners in § 18-60-401 et seq., must be disinterested and impartial and not a party to or a participant in the action.

History. Acts 2015, No. 107, § 1.

18-60-1006. Determination of value.

(a) Except as otherwise provided in subsections (b) and (c), if the court determines that the property that is the subject of a partition action is heirs property, the court shall determine the fair market value of the property by ordering an appraisal pursuant to subsection (d).

(b) If all cotenants have agreed to the value of the property or to another method of valuation, the court shall adopt that value or the value produced by the agreed method of valuation.

(c) If the court determines that the evidentiary value of an appraisal is outweighed by the cost of the appraisal, the court, after an evidentiary hearing, shall determine the fair market value of the property and send notice to the parties of the value.

(d) If the court orders an appraisal, the court shall appoint a disinterested real estate appraiser registered in this state to determine the fair market value of the property assuming sole ownership of the fee simple estate. On completion of the appraisal, the appraiser shall file a sworn or verified appraisal with the court.

(e) If an appraisal is conducted pursuant to subsection (d), not later than 10 days after the appraisal is filed, the court shall send notice to each party with a known address, stating:

- (1) the appraised fair market value of the property;
- (2) that the appraisal is available at the clerk's office; and

(3) that a party may file with the court an objection to the appraisal not later than 30 days after the notice is sent, stating the grounds for the objection.

(f) If an appraisal is filed with the court pursuant to subsection (d), the court shall conduct a hearing to determine the fair market value of

the property not sooner than 30 days after a copy of the notice of the appraisal is sent to each party under subsection (e), whether or not an objection to the appraisal is filed under subdivision (e)(3). In addition to the court-ordered appraisal, the court may consider any other evidence of value offered by a party.

(g) After a hearing under subsection (f), but before considering the merits of the partition action, the court shall determine the fair market value of the property and send notice to the parties of the value.

History. Acts 2015, No. 107, § 1.

18-60-1007. Cotenant buyout.

(a) If any cotenant requested partition by sale, after the determination of value under § 18-60-1006, the court shall send notice to the parties that any cotenant except a cotenant that requested partition by sale may buy all the interests of the cotenants that requested partition by sale.

(b) Not later than 45 days after the notice is sent under subsection (a), any cotenant except a cotenant that requested partition by sale may give notice to the court that it elects to buy all the interests of the cotenants that requested partition by sale.

(c) The purchase price for each of the interests of a cotenant that requested partition by sale is the value of the entire parcel determined under § 18-60-1006 multiplied by the cotenant's fractional ownership of the entire parcel.

(d) After expiration of the period in subsection (b), the following rules apply:

(1) If only one cotenant elects to buy all the interests of the cotenants that requested partition by sale, the court shall notify all the parties of that fact.

(2) If more than one cotenant elects to buy all the interests of the cotenants that requested partition by sale, the court shall allocate the right to buy those interests among the electing cotenants based on each electing cotenant's existing fractional ownership of the entire parcel divided by the total existing fractional ownership of all cotenants electing to buy and send notice to all the parties of that fact and of the price to be paid by each electing cotenant.

(3) If no cotenant elects to buy all the interests of the cotenants that requested partition by sale, the court shall send notice to all the parties of that fact and resolve the partition action under § 18-60-1008(a) and (b).

(e) If the court sends notice to the parties under subdivision (d)(1) or (2), the court shall set a date, not sooner than 60 days after the date the notice was sent, by which electing cotenants must pay their apportioned price into the court. After this date, the following rules apply:

(1) If all electing cotenants timely pay their apportioned price into court, the court shall issue an order reallocating all the interests of the

cotenants and disburse the amounts held by the court to the persons entitled to them.

(2) If no electing cotenant timely pays its apportioned price, the court shall resolve the partition action under § 18-60-1008(a) and (b) as if the interests of the cotenants that requested partition by sale were not purchased.

(3) If one or more but not all of the electing cotenants fail to pay their apportioned price on time, the court shall give notice to the electing cotenants that paid their apportioned price of the interest remaining and the price for all that interest.

(f) Not later than 20 days after the court gives notice pursuant to subdivision (e)(3), any cotenant that paid may elect to purchase all of the remaining interest by paying the entire price into the court. After the 20-day period, the following rules apply:

(1) If only one cotenant pays the entire price for the remaining interest, the court shall issue an order reallocating the remaining interest to that cotenant. The court shall issue promptly an order reallocating the interests of all of the cotenants and disburse the amounts held by it to the persons entitled to them.

(2) If no cotenant pays the entire price for the remaining interest, the court shall resolve the partition action under § 18-60-1008(a) and (b) as if the interests of the cotenants that requested partition by sale were not purchased.

(3) If more than one cotenant pays the entire price for the remaining interest, the court shall reapportion the remaining interest among those paying cotenants, based on each paying cotenant's original fractional ownership of the entire parcel divided by the total original fractional ownership of all cotenants that paid the entire price for the remaining interest. The court shall issue promptly an order reallocating all of the cotenants' interests, disburse the amounts held by it to the persons entitled to them, and promptly refund any excess payment held by the court.

(g) Not later than 45 days after the court sends notice to the parties pursuant to subsection (a), any cotenant entitled to buy an interest under this section may request the court to authorize the sale as part of the pending action of the interests of cotenants named as defendants and served with the complaint but that did not appear in the action.

(h) If the court receives a timely request under subsection (g), the court, after hearing, may deny the request or authorize the requested additional sale on such terms as the court determines are fair and reasonable, subject to the following limitations:

(1) a sale authorized under this subsection may occur only after the purchase prices for all interests subject to sale under subsections (a) through (f) have been paid into court and those interests have been reallocated among the cotenants as provided in those subsections; and

(2) the purchase price for the interest of a nonappearing cotenant is based on the court's determination of value under § 18-60-1006.

History. Acts 2015, No. 107, § 1.

18-60-1008. Partition alternatives.

(a) If all the interests of all cotenants that requested partition by sale are not purchased by other cotenants pursuant to § 18-60-1007, or if after conclusion of the buyout under § 18-60-1007, a cotenant remains that has requested partition in kind, the court shall order partition in kind unless the court, after consideration of the factors listed in § 18-60-1009, finds that partition in kind will result in great prejudice to the cotenants as a group. In considering whether to order partition in kind, the court shall approve a request by two or more parties to have their individual interests aggregated.

(b) If the court does not order partition in kind under subsection (a), the court shall order partition by sale pursuant to § 18-60-1010 or, if no cotenant requested partition by sale, the court shall dismiss the action.

(c) If the court orders partition in kind pursuant to subsection (a), the court may require that one or more cotenants pay one or more other cotenants amounts so that the payments, taken together with the value of the in-kind distributions to the cotenants, will make the partition in kind just and proportionate in value to the fractional interests held.

(d) If the court orders partition in kind, the court shall allocate to the cotenants that are unknown, unlocatable, or the subject of a default judgment, if their interests were not bought out pursuant to § 18-60-1007, a part of the property representing the combined interests of these cotenants as determined by the court and this part of the property shall remain undivided.

History. Acts 2015, No. 107, § 1.

18-60-1009. Considerations for partition in kind.

(a) In determining under § 18-60-1008(a) whether partition in kind would result in great prejudice to the cotenants as a group, the court shall consider the following:

(1) whether the heirs property practicably can be divided among the cotenants;

(2) whether partition in kind would apportion the property in such a way that the aggregate fair market value of the parcels resulting from the division would be materially less than the value of the property if it were sold as a whole, taking into account the condition under which a court-ordered sale likely would occur;

(3) evidence of the collective duration of ownership or possession of the property by a cotenant and one or more predecessors in title or predecessors in possession to the cotenant who are or were relatives of the cotenant or each other;

(4) a cotenant's sentimental attachment to the property, including any attachment arising because the property has ancestral or other unique or special value to the cotenant;

(5) the lawful use being made of the property by a cotenant and the degree to which the cotenant would be harmed if the cotenant could not continue the same use of the property;

(6) the degree to which the cotenants have contributed their pro rata share of the property taxes, insurance, and other expenses associated with maintaining ownership of the property or have contributed to the physical improvement, maintenance, or upkeep of the property; and

(7) any other relevant factor.

(b) The court may not consider any one factor in subsection (a) to be dispositive without weighing the totality of all relevant factors and circumstances.

History. Acts 2015, No. 107, § 1.

18-60-1010. Open-market sale, sealed bids, or auction.

(a) If the court orders a sale of heirs property, the sale must be an open-market sale unless the court finds that a sale by sealed bids or an auction would be more economically advantageous and in the best interest of the cotenants as a group.

(b) If the court orders an open-market sale and the parties, not later than 10 days after the entry of the order, agree on a real estate broker licensed in this state to offer the property for sale, the court shall appoint the broker and establish a reasonable commission. If the parties do not agree on a broker, the court shall appoint a disinterested real estate broker licensed in this state to offer the property for sale and shall establish a reasonable commission. The broker shall offer the property for sale in a commercially reasonable manner at a price no lower than the determination of value and on the terms and conditions established by the court.

(c) If the broker appointed under subsection (b) obtains within a reasonable time an offer to purchase the property for at least the determination of value:

(1) the broker shall comply with the reporting requirements in § 18-60-1011; and

(2) the sale may be completed in accordance with state law other than this subchapter.

(d) If the broker appointed under subsection (b) does not obtain within a reasonable time an offer to purchase the property for at least the determination of value, the court, after hearing, may:

(1) approve the highest outstanding offer, if any;

(2) redetermine the value of the property and order that the property continue to be offered for an additional time; or

(3) order that the property be sold by sealed bids or at an auction.

(e) If the court orders a sale by sealed bids or an auction, the court shall set terms and conditions of the sale. If the court orders an auction, the auction must be conducted under § 18-60-401 et seq.

(f) If a purchaser is entitled to a share of the proceeds of the sale, the purchaser is entitled to a credit against the price in an amount equal to the purchaser's share of the proceeds.

History. Acts 2015, No. 107, § 1.

18-60-1011. Report of open-market sale.

(a) Unless required to do so within a shorter time by § 18-60-401 et seq., a broker appointed under § 18-60-1010(b) to offer heirs property for open-market sale shall file a report with the court not later than seven days after receiving an offer to purchase the property for at least the value determined under § 18-60-1006 or § 18-60-1010.

(b) The report required by subsection (a) must contain the following information:

- (1) a description of the property to be sold to each buyer;
- (2) the name of each buyer;
- (3) the proposed purchase price;
- (4) the terms and conditions of the proposed sale, including the terms of any owner financing;
- (5) the amounts to be paid to lienholders;
- (6) a statement of contractual or other arrangements or conditions of the broker's commission; and
- (7) other material facts relevant to the sale.

History. Acts 2015, No. 107, § 1.

18-60-1012. Uniformity of application and construction.

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

History. Acts 2015, No. 107, § 1.

18-60-1013. Relation to Electronic Signatures in Global and National Commerce Act.

This subchapter modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

History. Acts 2015, No. 107, § 1.

18-60-1014. Effective date.

This subchapter takes effect January 1, 2016.

History. Acts 2015, No. 107, § 1.

CHAPTER 61

STATUTES OF LIMITATIONS

SECTION.

- 18-61-101. Actions to recover land, tenements, or hereditaments.
 18-61-102. Entry upon land or tenements — Exception for unpaved road easements.
 18-61-103. Ejectment.

SECTION.

- 18-61-104. Forcible entry and detainer — Unlawful detainer.
 18-61-105. Recovery of lands sold at judicial sales generally.
 18-61-106. Recovery of lands held under tax title.

Effective Dates. Acts 1857, p. 80, § 5: effective on passage.

Acts 1875, No. 85, § 25: effective on passage.

Acts 1919, No. 100, § 2: effective on passage.

Acts 1945, No. 82, § 4: approved Feb. 21, 1945. Emergency clause provided: "It is hereby ascertained and declared by the 55th General Assembly of the State of Arkansas that as the law now stands many improvement districts are in danger of losing a large amount of revenue which is justly due them from lands heretofore forfeited to such districts for nonpayment of taxes, and that in many instances such loss of revenue will cause such districts to default in the payment of their bond and interest requirements; and that to permit

a person holding under a tax title from the State to avoid payment of improvement district taxes upon lands purchased from the State by him would result in an unequal distribution of taxation and thus throw more burden of taxation upon those taxpayers who have been paying their taxes; that it is not feasible for improvement districts to keep informed, as to the sale to the State and subsequent possession under a deed from the State, as to all of the lands within the boundaries of said district, and that an emergency, therefore, exists, and this act, being necessary for the immediate preservation of the public peace, health and safety, shall take effect and be in full force from and after its passage."

18-61-101. Actions to recover land, tenements, or hereditaments.

(a)(1) No person or his or her heirs shall have, sue, or maintain any action or suit, either in law or equity, for any lands, tenements, or hereditaments after seven (7) years once his or her right to commence, have, or maintain the suit shall have come, fallen, or accrued.

(2) All suits, either in law or equity, for the recovery of any lands, tenements, or hereditaments shall be had and sued within seven (7) years next after the title or cause of action accrued and no time after the seven (7) years shall have passed.

(b) If any person who is, or shall be, entitled to commence and prosecute a suit or action in law or equity is, or shall be, at the time the

right or title first accrued come or fallen within the age of twenty-one (21) or non compos mentis, the person or his or her heirs, shall and may, notwithstanding the seven (7) years may have expired, bring his or her suit or action if the infant or non compos mentis, or his or her heirs, shall bring it within three (3) years next after full age or coming of sound mind.

(c) No cumulative disability shall prevent the bar formed and constituted by the saving of this section.

(d) This section shall not apply to lands which have been sold to any improvement district of any kind or character for taxes due the districts, nor to any taxes due any improvement districts, but the lien of these taxes shall continue until paid.

(e)(1) Subsections (a)-(c) of this section do not apply to the circumstances set forth in subdivisions (e)(2) and (3) of this section.

(2) The public's right to use an unpaved road established by an easement is abandoned if:

(A) Access is denied by a gate across the road; and

(B) The gate is closed and locked continuously, other than briefly to allow access by the owner or others with the owner's express permission, for one (1) year.

(3) An action to assert the public's right to use an unpaved road established by an easement is barred after the easement is abandoned under subdivision (e)(2) of this section.

(4) This subsection does not apply to:

(A) A road or highway maintained by the State of Arkansas;

(B) A road maintained or accepted for perpetual maintenance by a county;

(C) A road maintained by an improvement district;

(D) A road within the jurisdictional limits of a city of the first class or city of the second class; or

(E) The claim or right of any person, his or her heirs, successors, assigns, or tenants who use the unpaved road as a means of ingress and egress to lands owned or leased by that person, his or her heirs, successors, assigns, or tenants.

History. Acts 1851, § 2, p. 145; 1919, No. 100, § 1; C. & M. Dig., § 6942; Pope's Dig., § 8918; Acts 1945, No. 82, § 1; A.S.A. 1947, § 37-101; Acts 2015, No. 1006, § 1.

Publisher's Notes. Subsection (b) of this section may be affected by § 9-25-

101, which provides that the age of majority is eighteen (18) years.

Amendments. The 2015 amendment added (e).

Cross References. Color of title, payment of tax on wild and unimproved land, § 18-11-103.

RESEARCH REFERENCES

Ark. L. Rev. Exemption Under the Statute of Limitations for Adverse Possession, 6 Ark. L. Rev. 37.

Real Property — Easements — Prescription Originating in Private Permissive Use, 6 Ark. L. Rev. 234.

Real Property — Adverse Possession in Arkansas — Actual Possession of Land, 14 Ark. L. Rev. 181.

Color of Title and Payment of Taxes: The New Requirements Under Arkansas Adverse Possession Law, 50 Ark. L. Rev. 489.

U. Ark. Little Rock L.J. Survey of

Arkansas Law, Property, 1 U. Ark. Little Rock L.J. 223.

Survey of Arkansas Law: Decedent's Estates, 4 U. Ark. Little Rock L.J. 199.

U. Ark. Little Rock L. Rev. Annual Survey of Caselaw, Property Law, 26 U. Ark. Little Rock L. Rev. 969.

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Applicability.

This section applies to actions to recover lands and does not govern suits to foreclose mortgages. *White v. White*, 198 Ark. 740, 131 S.W.2d 4 (1939).

Where heir of deceased was not a party to the determination of heirship proceedings and was not aware of decedent's death until several years later, limitation for filing an action for recovery of interest in land was governed by this section and not the statute of limitation for probate of estates (§ 28-53-101). *McBroom v. Clark*, 252 Ark. 372, 480 S.W.2d 947 (1972).

Adverse Possession.

For cases discussing adverse possession of mortgaged property, see *Ringo v. Woodruff*, 43 Ark. 469 (1884); *Whittington v. Flint*, 43 Ark. 504 (1884); *Smith v. Woolfolk*, 115 U.S. 143, 5 S. Ct. 1177, 29 L. Ed. 357 (1885); *Duke v. State*, 56 Ark. 485, 20 S.W. 600 (1892); *Wilson v. Rogers*, 97 Ark. 369, 134 S.W. 318 (1911); *Norris v. Scroggins*, 175 Ark. 50, 297 S.W. 1022 (1927); *Cupp v. Cady*, 190 Ark. 700, 81 S.W.2d 417 (1935); *Foster-Grayson Lumber Co. v. Bond*, 197 Ark. 1003, 125 S.W.2d 106 (1939).

Neither conveyances, nor color of title, nor payment of taxes, nor all combined can give title under this section since there must be actual possession for the requisite period. *Calloway v. Cossart*, 45 Ark. 81 (1885).

For cases discussing actual and constructive possession, see *Brown v. Bocquin*, 57 Ark. 97, 20 S.W. 813 (1892); *Haggart v. Ranney*, 73 Ark. 344, 84 S.W. 703 (1904); *Hardie v. Investment Guar. & Trust Co.*, 81 Ark. 141, 98 S.W. 701 (1906); *Poole v. Oliver*, 89 Ark. 578, 117 S.W. 747 (1909); *Thornton v. McDonald*, 167 Ark. 114, 266 S.W. 946 (1924); *Moore v. McHenry*, 167 Ark. 483, 268 S.W. 858 (1925); *Reddin v. Cottrell*, 178 Ark. 1178, 13 S.W.2d 813 (1929); *Dierks Lumber & Coal Co. v. Vaughn*, 131 F. Supp. 219 (E.D. Ark. 1954), *aff'd*, 221 F.2d 695 (8th Cir. 1955).

To amount to an investiture of title there must be open, notorious, peaceful,

continuous, and adverse possession for more than the statutory period. *Jeffery v. Jeffery*, 87 Ark. 496, 113 S.W. 27 (1908).

For cases discussing adverse possession by cotenants, see *Hill v. Cherokee Constr. Co.*, 99 Ark. 84, 137 S.W. 553 (1911); *Singer v. Naron*, 99 Ark. 446, 138 S.W. 958 (1911); *Bowers v. Rightsell*, 173 Ark. 788, 294 S.W. 21 (1927); *Elrod v. Elrod*, 192 Ark. 458, 92 S.W.2d 211 (1936); *Toomer v. Murphy*, 198 Ark. 610, 129 S.W.2d 937 (1939); *Blake v. Denman*, 218 Ark. 351, 236 S.W.2d 433 (1951); *Minton v. McGowan*, 253 Ark. 945, 490 S.W.2d 136 (1973).

In order that one may acquire a private right of way across another's land, the use must be under a claim of right and not permissive and must be used openly, continuously and adversely for the statutory period. *Medlock v. Owen*, 105 Ark. 460, 151 S.W. 995 (1912).

The possession which will bar the right of a former owner of land must be an open, notorious, continuous and exclusive possession under claim of title. *Young v. Knox*, 165 Ark. 129, 263 S.W. 52 (1924); *Smart v. Murphy*, 200 Ark. 406, 139 S.W.2d 33 (1940).

In order that adverse possession may ripen into ownership, possession for seven years must have been actual, open, notorious, continuous, hostile and exclusive, and it must be accompanied with an intent to hold against the true owner. *Terral v. Brooks*, 194 Ark. 311, 108 S.W.2d 489 (1937); *Stricker v. Britt*, 203 Ark. 197, 157 S.W.2d 18 (1941); *Montgomery v. Wallace*, 216 Ark. 525, 226 S.W.2d 551 (1950); *Dierks Lumber & Coal Co. v. Vaughn*, 131 F. Supp. 219 (E.D. Ark. 1954), *aff'd*, 221 F.2d 695 (8th Cir. 1955); *Harrison v. Collins*, 247 Ark. 210, 444 S.W.2d 861 (1969).

Mere possession, without color of title, for the statutory period is sufficient to vest title in the disseisor, if such possession is actual, adverse, continuous, open, notorious, exclusive, and hostile, and for the statutory period. *Rye v. Baumann*, 231 Ark. 278, 329 S.W.2d 161 (1959).

—Acquisition of Title.

The statute of limitations is not defensive alone but confers a title which can be enforced by suit. *Jacks v. Chaffin*, 34 Ark. 534 (1879); *Logan v. Jelks*, 34 Ark. 547 (1879); *Wilson v. Spring*, 38 Ark. 181 (1881); *Worthen v. Rushing*, 228 Ark. 445, 307 S.W.2d 890 (1957).

Once title has vested in adverse possessor by running of statute of limitations, his recognition of validity of another's claim to land does not divest the adverse possessor of title. *Hudson v. Stillwell*, 80 Ark. 575, 98 S.W. 356 (1906); *Hutt v. Smith*, 118 Ark. 10, 175 S.W. 399 (1915); *Stroud v. Snow*, 186 Ark. 550, 54 S.W.2d 693 (1932); *Dierks Lumber & Coal Co. v. Vaughn*, 131 F. Supp. 219 (E.D. Ark. 1954), *aff'd*, 221 F.2d 695 (8th Cir. 1955).

One in adverse possession of land under color of title for more than seven years acquires title. *Fletcher v. Josephs*, 105 Ark. 646, 152 S.W. 293 (1912).

Where adverse possessor had possession of land for over seven years, the title would become vested in him unless he unconditionally acknowledged the title to be in person from whom he later contracted to rent the land. *Turquett v. McMurray*, 110 Ark. 197, 161 S.W. 175 (1913).

Title of purchasers from adverse possessor may be perfected by the running of the statute. *Brinkley v. Taylor*, 111 Ark. 305, 163 S.W. 521 (1914).

A title acquired by adverse possession is a title in fee simple and is as perfect as a title by deed from the original owner. *Smart v. Murphy*, 200 Ark. 406, 139 S.W.2d 33 (1940); *Stricker v. Britt*, 203 Ark. 197, 157 S.W.2d 18 (1941); *Hart v. Sternberg*, 205 Ark. 929, 171 S.W.2d 475 (1943); *Palmer v. Sanders*, 233 Ark. 1, 342 S.W.2d 300 (1961).

Adverse possession maintained for the statutory seven year period vests title in adverse possessor as completely as would a conveyance from the holder of a valid record title. *Montgomery v. Wallace*, 216 Ark. 525, 226 S.W.2d 551 (1950); *Dierks Lumber & Coal Co. v. Vaughn*, 131 F. Supp. 219 (E.D. Ark. 1954), *aff'd*, 221 F.2d 695 (8th Cir. 1955); *Palmer v. Sanders*, 233 Ark. 1, 342 S.W.2d 300 (1961); *Buckhannon v. Nash*, 216 F. Supp. 843 (E.D. Ark. 1963); *Neyland v. Hunter*, 282 Ark. 323, 668 S.W.2d 530 (1984).

Title cannot be acquired by adverse possession of less than the statutory period. *Webb v. Miller*, 236 Ark. 245, 365 S.W.2d 450 (1963).

This section means that when one is in possession of land, no one may question his claim of ownership except within seven years after the cause of action first

accrues. *Utley v. Ruff*, 255 Ark. 824, 502 S.W.2d 629 (1973).

—Color of Title.

Color of title is not necessary to maintain the bar of the statute of limitations to the extent of actual possession. *Ferguson v. Peden*, 33 Ark. 150 (1878).

For cases discussing particular conveyances as constituting color of title, see *Logan v. Jelks*, 34 Ark. 547 (1879); *Bradbury v. Dumond*, 80 Ark. 82, 96 S.W. 390 (1906); *Brinneman v. Scholem*, 95 Ark. 65, 128 S.W. 584 (1910); *Parsons v. Sharpe*, 102 Ark. 611, 145 S.W. 537 (1912); *Fletcher v. Josephs*, 105 Ark. 646, 152 S.W. 293 (1912); *Kilpatrick v. Kilpatrick*, 204 Ark. 452, 162 S.W.2d 897 (1942); *Dierks Lumber & Coal Co. v. Vaughn*, 131 F. Supp. 219 (E.D. Ark. 1954), *aff'd*, 221 F.2d 695 (8th Cir. 1955); *Worthen v. Rushing*, 228 Ark. 445, 307 S.W.2d 890 (1957).

While color of title is not necessary to give title by limitations, it is necessary to extend the title so acquired beyond the limits of the actual possession. *Bradbury v. Dumond*, 80 Ark. 82, 96 S.W. 390 (1906); *Dierks Lumber & Coal Co. v. Vaughn*, 131 F. Supp. 219 (E.D. Ark. 1954), *aff'd*, 221 F.2d 695 (8th Cir. 1955); *Buckhannan v. Nash*, 216 F. Supp. 843 (E.D. Ark. 1963).

Possession of land for the statutory period will not ripen into title unless it is accompanied by a claim of title in fee. *Hardin v. Watson*, 104 Ark. 641, 148 S.W. 506 (1912).

One who without color of title enters upon a tract of unoccupied real property and takes visible, open and notorious possession of a part cannot extend his possession so as to embrace the whole tract merely by subsequently obtaining color of title to the entire tract and continuing to occupy only the part of the land of which he originally took actual possession. *Sanderson v. Thomas*, 192 Ark. 302, 90 S.W.2d 965 (1936).

Without color of title, it is necessary that adverse possessor have actual possession in order to claim the benefits of this section. *National Property Owners Ass'n v. Hogue*, 229 Ark. 743, 318 S.W.2d 151 (1958).

To prevail on a claim of adverse possession not under color of title, one must show actual possession for the statutory period. *Coons v. Lawler*, 237 Ark. 350, 372 S.W.2d 826 (1963); *Hill v. Surratt*, 240

Ark. 122, 398 S.W.2d 225 (1966); *DeClerk v. Johnson*, 268 Ark. 868, 596 S.W.2d 359 (Ct. App. 1980).

—Continuity of Possession.

An interruption of the possession is a new point from which the statute of limitations must run. *Byers v. Danley*, 27 Ark. 77 (1871); *Pulaski County v. State*, 42 Ark. 118 (1883).

The possession must be continuous for the full limitations period; if there is a break in the continuity, the adverse holding before and since the break cannot be tacked in computing the period. *Brown v. Hanauer*, 48 Ark. 277, 3 S.W. 27 (1886), overruled in part, *Price v. Price*, 253 Ark. 1124, 491 S.W.2d 793 (1973); *Nicklance v. Dickerson*, 65 Ark. 422, 46 S.W. 945 (1898).

Fitful, disconnected acts of possession accompanied with a claim of title is not sufficient to establish title. *Brown v. Bocquin*, 57 Ark. 97, 20 S.W. 813 (1892).

Continuity of adverse possession held not to have been broken. *Robinson v. Nordman*, 75 Ark. 593, 88 S.W. 592 (1905); *McComb v. Saxe*, 92 Ark. 321, 122 S.W. 987 (1909); *Wilson v. Rogers*, 97 Ark. 369, 134 S.W. 318 (1911); *Cupp v. Cady*, 190 Ark. 700, 81 S.W.2d 417 (1935).

Continuity of possession held to have been broken. *Chicago Mill & Lumber Co. v. Matthews*, 163 Ark. 571, 260 S.W. 963 (1924).

—Tacking.

An executed parol agreement by one to surrender possession to another is sufficient to constitute such continuity of possession and privity between the parties as to authorize the tacking of possession and completion of title by limitation. *Horseman v. Hinch*, 138 Ark. 415, 211 S.W. 385 (1919).

Although no color of title exists, possession of claimant's predecessors may be tacked to claimant's possession. *Dierks Lumber & Coal Co. v. Vaughn*, 131 F. Supp. 219 (E.D. Ark. 1954), *aff'd*, 221 F.2d 695 (8th Cir. 1955).

—Cotenants.

When a co-tenant executes a deed to a stranger to the title, describing the entire land, and such grantee enters into exclusive possession under such deed, then the deed constitutes color of title, and such entry commences the running of limita-

tion in favor of the grantee and against all co-tenants of the grantor. *Marshall v. Gadberry*, 303 Ark. 534, 798 S.W.2d 99 (1990).

—Notice of Adverse Claim.

For cases discussing what constitutes an "adverse claim," see *Livingston v. Cochran*, 33 Ark. 294 (1878); *Dowdle v. Wheeler*, 76 Ark. 529, 89 S.W. 1002 (1905); *Doniphan Lumber Co. v. Case*, 87 Ark. 168, 112 S.W. 208 (1908); *Davis v. Harrell*, 101 Ark. 230, 142 S.W. 156 (1911); *Keith v. Wheeler*, 105 Ark. 318, 151 S.W. 284 (1912); *Briggs v. Jones*, 132 Ark. 455, 201 S.W. 118 (1918); *Boyd v. Epperson*, 149 Ark. 527, 232 S.W. 939 (1921); *Sadler v. Campbell*, 150 Ark. 594, 236 S.W. 588 (1921); *McGraw v. Berry*, 152 Ark. 452, 238 S.W. 618 (1922); *Grayson-McLeod Lumber Co. v. Duke*, 160 Ark. 76, 254 S.W. 350 (1923); *Roach v. Knappenberger*, 172 Ark. 417, 288 S.W. 912 (1927); *Goodrich v. Mitchell*, 177 Ark. 842, 7 S.W.2d 979 (1928); *Sanderson v. Thomas*, 192 Ark. 302, 90 S.W.2d 965 (1936); *Jones v. Morgan*, 196 Ark. 1153, 121 S.W.2d 96 (1938); *Stricker v. Britt*, 203 Ark. 197, 157 S.W.2d 18 (1941); *Brandon v. Bryeans*, 203 Ark. 1117, 160 S.W.2d 205 (1942); *Dierks Lumber & Coal Co. v. Vaughn*, 131 F. Supp. 219 (E.D. Ark. 1954), *aff'd*, 221 F.2d 695 (8th Cir. 1955).

Notice of adverse holding not shown. *Cleveland v. Aldridge*, 94 Ark. 51, 125 S.W. 1016 (1910); *Massey v. Price*, 252 Ark. 617, 480 S.W.2d 337 (1972); *Pascall v. Smith*, 263 Ark. 428, 569 S.W.2d 89 (1978).

Statute of limitations ran against owner until it had knowledge of the adverse holding, even though it had knowledge of the possession; however, where possession was in fact adverse for more than seven years, title was perfected against the record owner whether it had knowledge of the adverse possession or not. *Little Rock & Ft. Smith Ry. v. Rankin*, 107 Ark. 487, 156 S.W. 431 (1913).

In order for adverse possessor to set the statute of limitations in motion, it was necessary for adverse possessor to hold the title adversely and to have exercised such acts of ownership as to indicate an intention to hold the land adversely to the son, who was the remainderman. *Miller v. Miller*, 130 Ark. 28, 195 S.W. 1071 (1917).

To establish title by adverse possession in one who acquired possession under license, he must have given notice that he

was holding adversely or his possession must have been so notoriously hostile as to constitute notice. *Meador v. Weathers*, 167 Ark. 264, 267 S.W. 787 (1925).

If the claimant so acts as to attract notice to his claim and persists in such action for the statutory period of time, knowledge of his hostile claim of title may be inferred as a matter of fact. *Dierks Lumber & Coal Co. v. Vaughn*, 131 F. Supp. 219 (E.D. Ark. 1954), *aff'd*, 221 F.2d 695 (8th Cir. 1955).

— — Permissive Possession.

For cases discussing what constitutes permissive possession, which will not start the running of the statute, in particular cases, see *Whittington v. Flint*, 43 Ark. 504 (1884); *Ringo v. Woodruff*, 43 Ark. 469 (1884); *Smith v. Woolfolk*, 115 U.S. 143, 5 S. Ct. 1177, 29 L. Ed. 357 (1885); *Duke v. State*, 56 Ark. 485, 20 S.W. 600 (1892); *Kell v. Butler*, 147 Ark. 521, 227 S.W. 774 (1921); *Dial v. Armstrong*, 195 Ark. 621, 113 S.W.2d 503 (1938); *Stricker v. Britt*, 203 Ark. 197, 157 S.W.2d 18 (1941); *Mikel v. Development Co.*, 269 Ark. 365, 602 S.W.2d 630 (1980).

When an entry is permissive, the statute will not begin to run against the legal owner until an adverse holding is declared and notice of such change is brought to the knowledge of the owner. *Britt v. Berry*, 133 Ark. 589, 202 S.W. 830 (1918); *United States Bond & Mtg. Co. v. Reddick*, 199 Ark. 82, 133 S.W.2d 23 (1939); *St. Louis Sw. Ry. v. Wallace*, 217 Ark. 278, 229 S.W.2d 659 (1950).

The holding of land begun by permission will not ripen into an adverse or hostile right until notice of such adverse holding is brought home to the owner and the holding has continued for the statutory period. *Fulcher v. Dierks Lumber & Coal Co.*, 164 Ark. 261, 261 S.W. 645 (1924); *Oliver v. Howie*, 170 Ark. 758, 281 S.W. 17 (1926).

Where possession, in its incipency, is permissive, the presumption is, in the absence of proof to the contrary, that subsequent possession is permissive also and such possession will not start the running of the statute of limitations. *Dial v. Armstrong*, 195 Ark. 621, 113 S.W.2d 503 (1938).

—Public Thoroughfares.

Adverse possession of a street of an incorporated town for the statutory period

will give title to the occupant and bar the town. *Town of El Dorado v. Ritchie Grocery Co.*, 84 Ark. 52, 104 S.W. 549 (1907) (decision prior to enactment of § 22-1-201).

Owners of lots abutting on a platted street have notice of the dedication and can build up no right by continued occupancy on account of delay of the city in opening the streets to public use. *City of Paragould v. Lawson*, 88 Ark. 478, 115 S.W. 379 (1908).

The right to a public highway once established by prescription or limitation may be abandoned by nonuser, and if so abandoned for a period of more than seven years, the right of the owner of the fee to re-enter and exclude the public from the use of the highway is restored. *McLain v. Keel*, 135 Ark. 496, 205 S.W. 894 (1918); *Johnston v. Verboon*, 269 Ark. 126, 598 S.W.2d 752 (1980).

Use of an alley for more than seven years by adjoining lot owners under circumstances showing that the use was made as a matter of right and not of permission was held to establish adverse use so as to ripen into title by limitation. *McGill v. Miller*, 172 Ark. 390, 288 S.W. 932 (1926).

The period for acquiring a prescriptive right-of-way over road is analogous to the statutory period for the acquiring of title by adverse possession. *Neyland v. Hunter*, 282 Ark. 323, 668 S.W.2d 530 (1984).

Prescriptive easement to use road not established. *Neyland v. Hunter*, 282 Ark. 323, 668 S.W.2d 530 (1984).

Road in question had been maintained by the highway department for a number of years and by the public for 55 to 60 years to gain access to a nearby river, and the landowners' predecessor in interest made no effort to close the road or to deny the public access; thus, there was sufficient evidence to show that the public openly and continuously used the roadway in question for seven years or more, and that the facts and circumstances surrounding the usage were such that the landowners knew or should have known it was adverse. *Carson v. County of Drew*, 354 Ark. 621, 128 S.W.3d 423 (2003).

—Sufficiency of Evidence.

Evidence held not sufficient to establish title by adverse possession under statute of limitations. *Scott v. Mills*, 49 Ark. 266, 4

S.W. 908 (1887); *Culver v. Gillian*, 160 Ark. 397, 254 S.W. 681 (1923); *Roberts v. Billingsley*, 218 Ark. 311, 236 S.W.2d 79 (1951); *Carpenter v. Franklin*, 228 Ark. 512, 308 S.W.2d 829 (1958); *National Property Owners Ass'n v. Hogue*, 229 Ark. 743, 318 S.W.2d 151 (1958); *Weston v. Hilliard*, 232 Ark. 535, 338 S.W.2d 926 (1960); *Laney v. Monsanto Chem. Co.*, 233 Ark. 645, 348 S.W.2d 826 (1961); *Coons v. Lawler*, 237 Ark. 350, 372 S.W.2d 826 (1963); *Reed v. Black*, 247 Ark. 768, 447 S.W.2d 660 (1969); *Pate v. Junkin*, 253 Ark. 923, 489 S.W.2d 802 (1973); *Uteley v. Ruff*, 255 Ark. 824, 502 S.W.2d 629 (1973).

Evidence held sufficient to establish acquisition of title by adverse possession for statutory period. *St. Louis, Iron Mountain & S. Ry. v. Martin*, 104 Ark. 274, 149 S.W. 69 (1912); *Stewart v. Pelt*, 198 Ark. 776, 131 S.W.2d 644 (1939); *Smart v. Murphy*, 200 Ark. 406, 139 S.W.2d 33 (1940); *McWilliams v. Touns*, 202 Ark. 159, 150 S.W.2d 34 (1941); *Hart v. Sternberg*, 205 Ark. 929, 171 S.W.2d 475 (1943); *Bridwell v. Davis*, 206 Ark. 445, 175 S.W.2d 992 (1943); *Roberts v. Burgett*, 209 Ark. 536, 191 S.W.2d 579 (1946); *Howell v. Baskins*, 213 Ark. 665, 212 S.W.2d 353 (1948); *Fort Smith v. France*, 250 Ark. 294, 465 S.W.2d 315 (1971); *Ralston v. Powers*, 269 Ark. 63, 598 S.W.2d 410 (1980).

Public prescriptive easement existed in the landowners' roadway, turnaround, landing, and parking area where the public had used property for more than seven years and landowners knew or should have known of adverse possession; because there was an acquiescence to long-time use, it operated to put landowners on sufficient notice of a claim of right. *Carson v. County of Drew*, 354 Ark. 621, 128 S.W.3d 423 (2003).

Neighboring land owner, who asserted a claim for an easement to use a gravel drive, failed to show the elements necessary to establish an easement by prescription because the land owner only showed that he had been continuously using the gravel drive for less than seven years, and when he was told to stop using the drive, he did. *Drummond v. Shepherd*, 97 Ark. App. 244, 247 S.W.3d 526 (2007).

Boundary Lines.

When a landowner takes possession under belief that he owns land without recognition of the possible right of another on

account of mistake in the boundary line, the former owner's title will be divested after the running of the statute. *Shirey v. Whitlow*, 80 Ark. 444, 97 S.W. 444 (1906); *Goodwin v. Garibaldi*, 83 Ark. 74, 102 S.W. 706 (1907); *O'Neal v. Ross*, 100 Ark. 555, 140 S.W. 743 (1911); *Butler v. Hines*, 101 Ark. 409, 142 S.W. 509 (1912); *Turner v. Thomason*, 126 Ark. 568, 191 S.W. 222 (1917).

When a landowner, through mistake as to his boundary line, takes possession of land of an adjacent owner, intending to claim only to the true boundary, such possession is not adverse and, though continued for the statutory period, does not divest title. *Shirey v. Whitlow*, 80 Ark. 444, 97 S.W. 444 (1906); *O'Neal v. Ross*, 100 Ark. 555, 140 S.W. 743 (1911); *Waters v. Madden*, 197 Ark. 380, 122 S.W.2d 554 (1938).

Where there is doubt or uncertainty or a dispute as to the true location of a boundary line, the parties may, by parol, fix a line which will at least, when followed by possession with reference to the boundary so fixed, be conclusive upon them although the possession is not for the full statutory period. *Turquett v. McMurrain*, 110 Ark. 197, 161 S.W. 175 (1913).

Adjoining landowners may, by parol, fix a boundary line that will bind them and their grantees, though their possession under such agreement may not continue for the statutory period. *Turquett v. McMurrain*, 110 Ark. 197, 161 S.W. 175 (1913); *Furrow v. Dunn*, 201 Ark. 23, 144 S.W.2d 31 (1940).

Trial court did not abuse its discretion in refusing to allow an individual to amend his pleadings under Ark. R. Civ. P. 15(b) to include a counterclaim for a prescriptive easement because the proof did not establish a prescriptive easement, given that there was no evidence of overt, adverse use for the statutory period under this section. *Myers v. Yingling*, 372 Ark. 523, 279 S.W.3d 83 (2008).

Burden of Proof.

The burden of proof is on the plaintiff to prove that the right of action accrued within the statutory period. *McNeil v. Garland & Nash*, 27 Ark. 343 (1871); *Yell v. Lane*, 41 Ark. 53 (1883); *Ouachita County v. Tufts*, 43 Ark. 136 (1884); *Brown v. Hanauer*, 48 Ark. 277, 3 S.W. 27 (1886), overruled in part, *Price v. Price*, 253 Ark.

1124, 491 S.W.2d 793 (1973); *Watkins v. Martin*, 69 Ark. 311, 65 S.W. 103 (1901).

The burden of establishing adverse possession is on the party claiming it. *Brown v. Bocquin*, 57 Ark. 97, 20 S.W. 813 (1892); *Newman v. Peay*, 117 Ark. 579, 176 S.W. 143 (1915); *Pate v. Junkin*, 253 Ark. 923, 489 S.W.2d 802 (1973).

A party claiming title by limitation has the burden of proof and where the testimony is not disputed, it is error to take the case from the jury and direct a verdict. *Maney v. Dennison*, 110 Ark. 571, 163 S.W. 783 (1914).

The burden of proof is upon one who pleads the statute of limitations. *Reaves v. Davidson*, 129 Ark. 88, 195 S.W. 19 (1917).

Adverse possession is an affirmative defense, and the burden of proof rests upon one asserting his claim of adverse possession to establish its essential elements by a preponderance of the evidence. *Dierks Lumber & Coal Co. v. Vaughn*, 131 F. Supp. 219 (E.D. Ark. 1954), *aff'd*, 221 F.2d 695 (8th Cir. 1955).

Conflict of Laws.

Questions arising upon the statute of limitations must be settled according to the law of the forum. *Burgett v. Williford*, 56 Ark. 187, 19 S.W. 750 (1892).

Counterclaim.

Appellee's counterclaim for quiet title was not barred by § 16-56-126(a)(1) as a prior court did not treat appellee's affirmative defense of adverse possession as a counterclaim under subsection (a) of this section, and the nonsuit of the prior action did not affect the statute of limitations, which had not begun to run on the quiet title claim as appellee was still in possession of the property. *Sutton v. Gardner*, 2011 Ark. App. 737, 387 S.W.3d 185 (2011).

Dower and Curtesy.

The statute of limitations runs against the widow's dower in favor of a stranger from date of the husband's death. *Stidham v. Matthews*, 29 Ark. 650 (1874).

The statute of limitations does not run in favor of a grantee of the tenant by curtesy and against the heir until the expiration of the curtesy. *Banks v. Green*, 35 Ark. 84 (1879).

The statute of limitations does not run against a widow's dower until seven years after the purchase of the land by a

stranger. *Webb v. Smith*, 40 Ark. 17 (1882); *McWhirter v. Roberts*, 40 Ark. 283 (1883).

Where a widow conveyed her dower interest in land before it was assigned to her, the heir may recover the land from her vendee, but the statute of limitations is not in motion against the heir when the widow's vendee enters into possession. *Brinkley v. Taylor*, 111 Ark. 305, 163 S.W. 521 (1914).

The right of the heirs does not accrue until after the death of the widow to whom the land was assigned as dower and the limitations do not begin to run against them until their right accrues. *Kennedy v. Burns*, 140 Ark. 367, 215 S.W. 618 (1919).

The possession of a husband as tenant by the curtesy, or of his grantee, is not adverse to his wife's heirs, and limitation does not run against such heir until the death of the life tenant. *Smith v. Maberry*, 148 Ark. 216, 229 S.W. 718 (1921).

Where a widow executed a conveyance of a decedent's homestead, the fact that she had an unassigned right of dower did not bar the right of entry of the decedent's heirs so as to prevent the statute of limitations from running against such heirs. *Murphy v. Graves*, 170 Ark. 180, 279 S.W. 359 (1926).

A widow's unassigned dower will not bar the right of reentry by heirs so as to prevent the statute of limitations from running in favor of an adverse occupant. *Clark v. Friend*, 174 Ark. 26, 295 S.W. 392 (1927).

The statute of limitations does not run against a widow in favor of heirs whose duty it is to assign dower to her. *Wood v. Wood*, 203 Ark. 344, 157 S.W.2d 36 (1941).

Effect of Amendment.

Where the statutory bar was complete, subsequent amendment of this section did not revive the claim since the rights of the parties had become vested before amendment. *Davidson v. Hartsfield*, 250 Ark. 1072, 468 S.W.2d 774 (1971).

Equity.

At law the statute of limitations must be pleaded to be available, but in equity it has always been considered as affecting the equity of a bill, upon the principle that the court will not interfere to enforce rights upon which claimants have too long slept. *Riley v. Norman*, 39 Ark. 158 (1882).

When applicable in equity, the statute is as binding as at law. *McGaughey v. Brown*, 46 Ark. 25 (1885); *Millington v. Hill*, 47 Ark. 301, 1 S.W. 547 (1886).

In the absence of some intervening equity calling for application of the doctrine of laches, equity by analogy follows the law and will not divest the owner of title by lapse of time shorter than the period of limitations. *Earle Imp. Co. v. Chatfield*, 81 Ark. 296, 99 S.W. 84 (1907).

For cases discussing equitable doctrine of laches in actions to recover lands, see *City of Stuttgart v. John*, 85 Ark. 520, 109 S.W. 541 (1908); *Anders v. Roark*, 108 Ark. 248, 156 S.W. 1018 (1913); *Inman v. Quirey*, 128 Ark. 605, 194 S.W. 858 (1917); *Toomer v. Murphy*, 198 Ark. 610, 129 S.W.2d 937 (1939); *Kitchens v. Wheeler*, 200 Ark. 671, 141 S.W.2d 34 (1940); *Eades v. Joslin*, 219 Ark. 688, 244 S.W.2d 623 (1951).

Homestead Rights.

As the right of an adult child to enter upon the homestead of his parent does not accrue until the homestead right of the youngest child has ceased on his coming of age, the statute of limitations will not run until that time. *Harris v. Brady*, 87 Ark. 428, 112 S.W. 974 (1908); *Smith v. Scott*, 92 Ark. 143, 122 S.W. 501 (1909); *Lesser v. Reeves*, 142 Ark. 320, 219 S.W. 15 (1920); *Brownfield v. Bookout*, 147 Ark. 555, 228 S.W. 51 (1921).

Suit by children to hold the surviving husband liable for rents of the homestead during their minority is barred unless brought by them within the statutory period after reaching their majority. *Carroll v. Carroll*, 92 Ark. 625, 121 S.W. 947 (1909).

Suit by child to recover parents' homestead not barred. *Krow v. Bernard*, 152 Ark. 99, 238 S.W. 19 (1922); *Hart v. Wimberly*, 173 Ark. 1083, 296 S.W. 39 (1927).

In view of the fact that a husband may abandon his homestead, a right-of-way over it may be acquired by adverse user for the statutory period. *Neil v. Neil*, 172 Ark. 381, 288 S.W. 890 (1926).

The statute of limitations began to run in favor of the heirs when spouse abandoned homestead. *Smart v. Murphy*, 200 Ark. 406, 139 S.W.2d 33 (1940).

Improvement Districts.

The proviso that the section shall not extend to any improvement district is also

available to a purchaser from an improvement district. *Davidson v. Hartsfield*, 250 Ark. 1072, 468 S.W.2d 774 (1971).

The clear intention of the 1945 amendment to this section was to permit an improvement district to hold title without taking possession from the landowner but not at the risk of bar of a prospective sale by the limitations period. *Davidson v. Hartsfield*, 250 Ark. 1072, 468 S.W.2d 774 (1971).

Where title to a piece of property had vested in an improvement district as the result of foreclosure, title was in one who had purchased from the improvement district rather than one who claimed to have acquired the land by adverse possession. *Davidson v. Hartsfield*, 250 Ark. 1072, 468 S.W.2d 774 (1971).

Where the quitclaim deed to the defendant conveyed all right and title of the improvement district, this section could have been relied upon by the defendant in the plaintiff's action to quiet title. *Davidson v. Hartsfield*, 250 Ark. 1072, 468 S.W.2d 774 (1971).

Jury Questions.

It was error to take question of adverse possession from jury. *Bayles v. Daugherty*, 77 Ark. 201, 91 S.W. 304 (1905); *Goodwin v. Garibaldi*, 83 Ark. 74, 102 S.W. 706 (1907); *Couch v. Adams*, 111 Ark. 604, 164 S.W. 728 (1914).

Whether adverse possession has been established is a question of fact for the jury. *Montgomery v. Wallace*, 216 Ark. 525, 226 S.W.2d 551 (1950); *Palmer v. Sanders*, 233 Ark. 1, 342 S.W.2d 300 (1961).

Mineral Rights.

Where the title to minerals is separated from the title to the surface, the statute of limitations does not run against the right to the minerals unless there is an actual adverse holding which constitutes an invasion of these particular rights. *Bodcaw Lumber Co. v. Goode*, 160 Ark. 48, 254 S.W. 345 (1923).

Persons Against Whom Statute Runs.

While the state, in the exercise of its sovereign powers, is not barred by the statute of limitations, the public itself, in the assertion of rights through other agencies, is barred by the statute of limitations where there are no limitations in its favor.

Town of Madison v. Bond, 133 Ark. 527, 202 S.W. 721 (1918).

The statute of limitations as to real estate is one of repose and intended to quiet titles and it operated in favor of or against religious societies as well as natural persons and private corporations. *Young v. Knox*, 165 Ark. 129, 263 S.W. 52 (1924).

—Married Women.

Note. Section 9-11-501 et seq., enacted in 1915, removed all disabilities of married women.

Action by married woman not barred by limitations. *Rowland v. Taylor*, 134 Ark. 183, 203 S.W. 1034 (1918).

Action by married woman held barred by statute of limitations. *Holloway v. Eagle*, 135 Ark. 206, 205 S.W. 113 (1918).

An action by a married woman to recover land is barred by a lapse of more than seven years after her cause of action accrued. *Hoggard v. Mitchell*, 164 Ark. 296, 261 S.W. 643 (1924).

—Minors.

Infancy of the plaintiff is no protection to the bar of the statute of limitations when it begins to run in the lifetime of his ancestor. *Bender v. Bean*, 52 Ark. 132, 12 S.W. 180, modified, 52 Ark. 146, 12 S.W. 241 (1889); *Bowen v. Black*, 170 Ark. 237, 279 S.W. 782 (1926).

Statutes of limitations are not applicable to suits for redemption of land sold for taxes brought within two years of the reaching of majority. *Hodges v. Harkle-road*, 74 Ark. 343, 85 S.W. 779 (1905).

Statute held not to run against minor. *Rowe v. Allison*, 87 Ark. 206, 112 S.W. 395 (1908).

The right of an infant against one who takes possession of its land is barred three years after the infant reaches his majority in the absence of any showing of fraud practiced on the infant by the other party or those under whom he claims. *Reed v. Money*, 115 Ark. 1, 170 S.W. 478 (1914).

Adverse possession of land will bar recovery by an infant only when he fails to sue within three years after attaining his majority. *Jackson v. Cole*, 146 Ark. 565, 226 S.W. 513 (1920).

Action by minor held barred. *Cunningham v. Dellmon*, 151 Ark. 409, 237 S.W. 450 (1922); *Ulrich v. Coleman*, 218 Ark. 236, 235 S.W.2d 868 (1951); *Norwood v.*

Allen, 240 Ark. 232, 398 S.W.2d 684 (1966).

—Municipal Corporations.

Statute runs against a municipal corporation. *Ft. Smith v. McKibbin*, 41 Ark. 45 (1883); *City of Little Rock v. Wright*, 58 Ark. 142, 23 S.W. 876 (1893); *City of Helena v. Hornor*, 58 Ark. 151, 23 S.W. 966 (1893).

Where an incorporated town ceased to elect officers or exercise its functions as such, this would not bar the running of the statute against it as to one occupying a portion of a public street since, in spite of the nonuser of the corporate franchise, it still existed and the town possessed the right to sue. *Town of Madison v. Bond*, 133 Ark. 527, 202 S.W. 721 (1918).

—Non Compos Mentis.

This section does not run against a non compos seeking to establish a will that has been concealed. *Arrington v. McLemore*, 33 Ark. 759 (1878).

Adverse possession cannot run against one who is non compos mentis. *Woodall v. Wilkerson*, 233 Ark. 28, 342 S.W.2d 405 (1961).

Running of period of adverse possession against alleged true owner was not interrupted when alleged owner was declared mentally incompetent. *Sparks v. Shepherd*, 255 Ark. 969, 504 S.W.2d 716 (1974).

—Railroads.

The statute of limitations runs against a railroad company whose right-of-way is held adversely by another. *Saint Louis & S.F.R.R. v. Ruttan*, 90 Ark. 178, 118 S.W. 705 (1909).

It is well established that the statute of limitations operates against railroad corporations where land is held adversely as well as against individuals and this applies to rights-of-way. *St. Louis Sw. Ry. v. Wallace*, 217 Ark. 278, 229 S.W.2d 659 (1950).

—Remaindermen.

The statute of limitations does not run against a remainderman until the death of the life tenant. *Watson v. Hardin*, 97 Ark. 33, 132 S.W. 1002 (1910); *Rogers v. Ogburn*, 116 Ark. 233, 172 S.W. 867 (1915); *Le Sieur v. Spikes*, 117 Ark. 366, 175 S.W. 413 (1915); *Hamilton v. Farmer*, 173 Ark. 341, 292 S.W. 683 (1927); *Heustess v. Oswalt*, 253 Ark. 730, 488 S.W.2d

707 (1973); *Raborn v. Buffalo*, 260 Ark. 531, 542 S.W.2d 507 (1976).

The remainderman alone can protect possession prior to the assignment of dower and as the remainderman is entitled to immediate possession, the statute of limitation will begin to run against him. *Hayden v. Hill*, 128 Ark. 342, 194 S.W. 19 (1917).

There is an exception to the rule that seven years' delay after the death of the decedent bars an application to sell his lands for debts, where his estate in the land was that of a remainderman and the life tenant survived him in which case the statute of limitations did not run until the death of the life tenant. *Field v. Tyner*, 163 Ark. 373, 261 S.W. 35 (1924).

While a valid tax sale bars the right of all interested parties, including those holding remainder interests as well as the life tenant, yet when the sale is void, one who enters under a void sale is a trespasser and the statute of limitations does not run against the remainderman until the expiration of the life estate. *Jones v. Fowler*, 171 Ark. 594, 285 S.W. 363 (1926).

—Trusts.

When a trustee holding legal title is barred, his beneficiaries are likewise barred. *Chase v. Cartwright*, 53 Ark. 358, 14 S.W. 90 (1890).

Whenever the right of action of a trustee is barred by limitations, the right of the cestui que trust thus represented is barred also. *Little v. McGuire*, 113 Ark. 497, 168 S.W. 1084 (1914).

The statute of limitations does not bar a trust unless the circumstances raise a presumption of the extinguishment of the trust or unless there has been an open denial or repudiation of the trust. *Clark v. Clark*, 191 Ark. 461, 86 S.W.2d 937 (1935).

—Vendor-Vendee.

Statute of limitations does not run in favor of a vendor who is under obligations to convey the legal title until he has given the vendee notice of such intention. *Coleman v. Hill*, 44 Ark. 452 (1884).

The statute does not run against a vendor in favor of a vendee holding under a contract for sale and purchase; nor does it run where the original possession of the holder seeking to plead the statute was in privity with the rightful owner. *Tillar v. Clayton*, 76 Ark. 405, 88 S.W. 972 (1905).

The statute of limitations does not run against a vendor in favor of a vendee holding under a contract of purchase, nor does it run where the original possession of the holder was in privity with the rightful owner until there is an open and explicit disavowal and disclaimer of holding under that title brought home to the other party. *Perry v. Arkadelphia Lumber Co.*, 83 Ark. 374, 103 S.W. 724 (1907).

Where a vendor of land takes possession to enforce his lien, in order to set the statute of limitations running by adverse possession, there must be either express notice to the owners or acts of such notorious hostility as to put the owners on notice. *McGinnis v. Less*, 147 Ark. 211, 227 S.W. 398 (1921).

Pleading.

The statute of limitations pleaded by one defendant does not inure to the benefit of another. *Hall v. Bonville*, 36 Ark. 491 (1880).

An answer pleading the seven year statute of limitations without alleging that the seven years were before the commencement of the action is insufficient. *Gates v. Solomon*, 73 Ark. 8, 83 S.W. 348 (1904).

Answer held sufficient to raise the defense of the general statute of limitations. *McKewen v. Allen*, 80 Ark. 181, 96 S.W. 392 (1906).

When the defense of adverse possession is pleaded, such plea will be treated as a confession of ouster in ejectment suits. *Bradley Lumber Co. v. Burbridge*, 213 Ark. 165, 210 S.W.2d 284 (1948).

Where an action is brought in the name of a nonexistent plaintiff, an amendment of complaint substituting the proper party to the action as plaintiff will be regarded as the institution of a new action for purposes of this section. *White v. Welsh*, 327 Ark. 465, 939 S.W.2d 299 (1997).

Running of Statute Generally.

In computing the time of limitations, the day on which the action accrued must be included and the day the summons is issued excluded. *Shinn v. Tucker*, 33 Ark. 421 (1878).

Where a nonsuit was taken in an action to recover land and a subsequent action begun relying upon a different chain of title from that relied upon in the first action, the running of the statute was not

stopped by the commencement of the first action. *Covington v. Berry*, 76 Ark. 460, 88 S.W. 1005 (1905).

The statute of limitations continues to run as to a cause of action not included in the original complaint but first set up in an amendment thereto until the filing of such amendment. *Cottonwood Lumber Co. v. Walker*, 106 Ark. 102, 152 S.W. 1005 (1912).

Owners of land used by a city as a dump did not have a viable cause of action against the city for inverse condemnation because the seven-year statute of limitations had expired; the city's use of the land as a dump since the 1950s showed an intent to possess adversely, and no action had been filed previously. *Daniel v. City of Ashdown*, 94 Ark. App. 446, 232 S.W.3d 511 (2006).

Brother was unable to challenge the validity of a deed supposedly executed by his mother in 1984 because his action was filed 20 years later; the seven-year statute of limitations in this section began to run at the mother's death in 1992. Moreover, laches applied since the purported owner's position was detrimentally changed where witnesses were unavailable. *Jaramillo v. Adams*, 100 Ark. App. 335, 268 S.W.3d 351 (2007).

In a case where heirship was being determined, the action was not barred by the limitations periods in this section and § 16-56-115 because the time period did not begin to run until a pecuniary consequence arose; there had been no demand for the trust property that would have triggered the limitations period. Moreover, the case was filed within the limitations period if it began to run when mineral leases were executed. *Scroggin v. Scroggin*, 103 Ark. App. 144, 286 S.W.3d 758 (2008).

—Accrual of Action.

The statute does not begin to run against an estate until an administrator is appointed. *McCustian v. Ramey*, 33 Ark. 141 (1878); *Word v. West*, 38 Ark. 243 (1881).

The statute began to run against an action to declare a deed absolute to be a mortgage and intended to secure a note from the time the note matured. *Stebbins v. Clendenin*, 136 Ark. 391, 206 S.W. 681 (1918).

Where a purchaser of land, finding himself unable to pay for the land, directed his

tenant to attorn to the vendor, which was done, and the purchaser died before executing a reconveyance, the attornment by the tenant formed a point from which the statute of limitations would run against the heirs of the purchaser. *Freer v. Less*, 159 Ark. 509, 252 S.W. 354 (1923).

—Bar of Claims.

A verbal promise to pay a debt barred by limitation will not revive the debt or remove the bar. *Worthington v. De Bardlekin*, 33 Ark. 651 (1878).

A vendor's lien is barred when the debt is barred. *Chase v. Cartwright*, 53 Ark. 358, 14 S.W. 90 (1890).

There must be an actual adverse holding for the statutory period before a creditor is barred of his right to set aside a fraudulent conveyance and subject the property to the payment of his debt. *James v. Mallory*, 76 Ark. 509, 89 S.W. 472 (1905).

Action to recover interest in land held barred. *Landman v. Fincher*, 196 Ark. 609, 119 S.W.2d 521 (1938); *Grogan v. Weatherby*, 196 Ark. 705, 119 S.W.2d 552 (1938); *Brandon v. Bryeans*, 203 Ark. 1117, 160 S.W.2d 205 (1942).

Defendant in action to quiet title held barred from asserting claim to land. *Manier v. Hodges*, 217 Ark. 481, 230 S.W.2d 960 (1950).

Action to recover interest in land held not barred. *Eades v. Joslin*, 219 Ark. 688, 244 S.W.2d 623 (1951).

This section does not prohibit a person in possession from suing to remove a cloud on his title even though the cloud has been in existence and within the knowledge of the possessor for more than the statutory period since there is no necessity for resorting to legal remedies until there is an interference with possession. *Dotson v. Aldridge*, 246 Ark. 456, 438 S.W.2d 464 (1969).

This statute of limitation governs the right to challenge another in actual or adverse possession of a tract of land for seven years; accordingly, where developer was in possession of property for more than the statutory period prior to power company's suit for title to the property, such suit was untimely. *Arkansas Power & Light Co. v. Arkansas Communities, Inc.*, 33 B.R. 800 (W.D. Ark. 1983), *aff'd*, 741 F.2d 185 (8th Cir. 1984).

—Knowledge.

Mere ignorance of the existence of a cause does not prevent the running of the statute of limitations. *Hibben v. Malone*, 85 Ark. 584, 109 S.W. 1008 (1908).

The statute of limitations will not run in favor of parties to a forged deed until a discovery of the forgery by the true owners of the land. *Walden v. Blassingame*, 130 Ark. 448, 197 S.W. 1170 (1917).

The statute of limitations does not run against the grantee of land until he knows of the existence of a deed in his favor, where the deed was intentionally withheld from him by the party holding possession of the land. *Peters v. Priest*, 134 Ark. 161, 203 S.W. 1042 (1918).

Mere ignorance on the part of a cotenant concerning her right to land adversely occupied by another tenant or even a joint mistake of law on the part of both cotenants as to their respective rights to the land did not affect the running of the statute of limitations under which title by adverse possession is claimed, the mistake not being caused by fraudulent concealment or misrepresentation. *McKinney v. Beattie*, 157 Ark. 356, 248 S.W. 280 (1923).

Mere ignorance of one's rights does not prevent the running of the statute of limitations or laches against him unless the ignorance is due to the fraudulent concealment or misrepresentations on the part of those invoking the benefit of the statute of limitations or the doctrine of laches. *Landman v. Fincher*, 196 Ark. 609, 119 S.W.2d 521 (1938).

Suspension.

This statute of limitations was suspended in wartime. *Metropolitan Nat'l Bank v. Gordon*, 28 Ark. 115 (1872); *Eidins v. Graddy*, 28 Ark. 500 (1873); *Hall v. Denckla*, 28 Ark. 506 (1873), overruled, *Whittington v. Flint*, 43 Ark. 504 (1884); *Worthington v. De Bardlekin*, 33 Ark. 651 (1878).

This statute of limitations does not run while the title to land is in the United States. *Nichols v. Council*, 51 Ark. 26, 9 S.W. 305 (1888).

The statute of limitations does not run against claims existing between husband and wife during the continuance of marital relations. *Hamby v. Brooks*, 86 Ark. 448, 111 S.W. 277 (1908).

Where, after a suit to quiet title was begun, the parties agreed to let the own-

ership abide the decision of the United States Department of the Interior, the agreement operated to prevent the running of statute of limitations till the decision of the United States Department of the Interior was made and the plaintiff's action brought within time thereafter was not barred. *Webb v. Spann*, 157 Ark. 328, 248 S.W. 285 (1923).

Where adverse possessor took possession of land under an agreement entitling him to do so in the lifetime of the original owner, this adverse holding put the statute of limitations in motion against him and its running was not arrested by his death. *Arnold v. Arnold*, 193 Ark. 109, 97 S.W.2d 634 (1936).

Waiver.

Where an absolute deed was executed to secure payment of a note and creditor accepted payment of the debt after expiration of statute of limitations, the creditor has waived the right to invoke the statute of limitations in a suit by the debtor to revest title in himself. *Stebbins v. Clendenin*, 136 Ark. 391, 206 S.W. 681 (1918).

Because appellant never raised the statute of limitations as a defense below, the issue was waived. *Osborn v. Tennison*, 2014 Ark. App. 175, 434 S.W.3d 1 (2014).

Wild and Unimproved Land.

Section 18-11-102, when coupled with this section, works to invest title in one who has paid taxes on wild and unenclosed lands for a period in excess of seven years. *Broadhead v. McEntire*, 19 Ark. App. 259, 720 S.W.2d 313 (1986).

The purchaser of the land was not entitled to have his title confirmed by actual

physical possession of the property for more than seven years, where there was evidence that he had only been on the property four or five times during the seven-year period and his other acts of possession were merely fitful, and it was stipulated by the parties that the property was wild and unimproved and not occupied by anyone. *Broadhead v. McEntire*, 19 Ark. App. 259, 720 S.W.2d 313 (1986).

Cited: *Clements v. Lampkin*, 34 Ark. 598 (1879); *Clements v. Cates*, 49 Ark. 242, 4 S.W. 776 (1887); *Brake v. Sides*, 95 Ark. 74, 128 S.W. 572 (1910); *Tegarden v. Hurst*, 123 Ark. 354, 185 S.W. 463 (1916); *Carter v. Stewart*, 149 Ark. 189, 231 S.W. 887 (1921); *Hinton v. Martin*, 151 Ark. 343, 236 S.W. 267 (1922); *Shelby v. Shelby*, 182 Ark. 881, 32 S.W.2d 1071 (1930); *Daniels v. Moore*, 197 Ark. 727, 125 S.W.2d 456 (1939); *Dill v. Snodgrass*, 213 Ark. 526, 211 S.W.2d 440 (1948); *Dodson v. Thomason*, 217 Ark. 747, 233 S.W.2d 395 (1950); *Coulter v. Anthony*, 228 Ark. 192, 308 S.W.2d 445 (1957); *Stevens v. French*, 227 Ark. 864, 302 S.W.2d 286 (1957); *Rindeikis v. Coffman*, 231 Ark. 422, 329 S.W.2d 550 (1959); *Vesper v. Woolsey*, 231 Ark. 782, 332 S.W.2d 602 (1960); *Mason v. Morel*, 234 Ark. 660, 354 S.W.2d 19 (1962); *Fuller v. Fuller*, 240 Ark. 475, 400 S.W.2d 283 (1966); *Eubanks v. Zimmerman*, 255 Ark. 53, 498 S.W.2d 655 (1973); *Weston v. Bachman*, 682 F.2d 202 (8th Cir. 1982); *Mitchell v. Hammons*, 31 Ark. App. 180, 792 S.W.2d 333 (1990); *Smith v. MRCC Partnership*, 302 Ark. 547, 792 S.W.2d 301 (1990); *McKenzie v. City of White Hall*, 112 F.3d 313 (8th Cir. 1997); *Dohle v. Duffield*, 2012 Ark. App. 217, 396 S.W.3d 780 (2012).

18-61-102. Entry upon land or tenements — Exception for unpaved road easements.

(a) An entry upon lands or tenements shall not be deemed sufficient or valid as a claim unless an action is commenced thereon within one (1) year after the entry and within seven (7) years from the time when the right to make the entry descended or accrued.

(b) This section does not apply to the circumstances set forth in § 18-61-101(e)(2) and (3).

History. Rev. Stat., ch. 91, § 2; C. & M. Dig., § 6944; Pope's Dig., § 8922; Acts 1945, No. 82, § 1; A.S.A. 1947, § 37-104; Acts 2015, No. 1006, § 2.

A.C.R.C. Notes. Acts 2015, No. 1006, § 2 added subsection "(b) This section does not apply to the circumstances set forth in § 18-61-101 (e)(2) and (3)" with-

out proper markup.

Amendments. The 2015 amendment added “Exception for unpaved road easements” in the section heading; designated

the existing language as (a); substituted “An entry ... shall not” for “No entry upon lands or tenements shall be” in (a); and added (b).

18-61-103. Ejectment.

No action of ejectment, when the plaintiff does not claim title to the lands, shall be brought or maintained when the plaintiff, or his or her testator or intestate, has been five (5) years out of possession.

History. Rev. Stat., ch. 53, § 20; C. & M. Dig., § 6948; Pope’s Dig., § 8926; A.S.A. 1947, § 37-106.

Cross References. Ejectment and trespass, § 18-60-201 et seq.

CASE NOTES

Applicability.

In an ejectment matter, the statute of limitations for removal of a person from land, rather than the statute of limita-

tions for cancellation of instruments, applies. *Schwarz v. Colonial Mtg. Co.*, 326 Ark. 455, 931 S.W.2d 763 (1996).

18-61-104. Forcible entry and detainer — Unlawful detainer.

Three (3) years’ peaceable and uninterrupted possession of the premises immediately preceding the filing of a complaint for forcible entry and detainer or unlawful detainer may be pleaded by any defendant in bar of the plaintiff’s demand for possession.

History. Acts 1875, No. 85, § 20, p. 196; C. & M. Dig., § 4858; Pope’s Dig., § 6055; A.S.A. 1947, § 37-107.

Cross References. Forcible entry and detainer; unlawful detainer, § 18-60-301 et seq.

CASE NOTES

ANALYSIS

Bar of Claims.
Running of Statute.

Bar of Claims.

Where tenant was in possession under contract providing for free rental for three years, landlord’s unlawful detainer action, brought promptly when the demand for rent for the fourth year accrued and was

refused, was not barred by the statute of limitations. *Bolin v. Drainage Dist. No. 17*, 206 Ark. 459, 176 S.W.2d 143 (1943).

Running of Statute.

The limitation does not begin to run until the termination of the tenancy. *Sanders v. Hall*, 172 Ark. 1177, 288 S.W. 914 (1926).

Cited: *Smith v. Campbell*, 71 Ark. App. 23, 26 S.W.3d 139 (2000).

18-61-105. Recovery of lands sold at judicial sales generally.

All actions against the purchaser or his or her heirs or assigns for the recovery of lands sold at judicial sales shall be brought within five (5) years after the date of the sale and not thereafter, except for minors, persons of unsound mind, and persons imprisoned overseas, the period shall be three (3) years after this disability shall have been removed.

History. Rev. Stat., ch. 91, § 35; C. & M. Dig., § 6946; Pope's Dig., § 8924; A.S.A. 1947, § 37-108.

Cross References. Time to redeem property sold upon execution, § 16-66-502.

CASE NOTES

ANALYSIS

Purpose.
Applicability.
Fraud.
Judicial Sales.
Persons Subject to Statute.
Recovery of Land.
Redemption of Property.
Running of Statute.
Void Sales.

Purpose.

This section is intended to require all parties to bring suits within five years after date of sale for the enforcement of such rights of recovery as could be enforced within that time, and is not a bar to rights of action against the purchaser arising after five years from date of sale. *Kessinger v. Wilson*, 53 Ark. 400, 14 S.W. 96 (1890).

Applicability.

This section applies only to actions brought for the recovery of lands and causes accruing within the period of limitation and is not applicable to enforce the lien created by a mortgage. *Duke v. State*, 56 Ark. 485, 20 S.W. 600 (1892).

This section applies to all causes of action which come into existence and are complete within five years from the date of sale, provided that the period of time between the completion of the cause of action and the expiration of the five years from date of sale is not too short to allow reasonable time to assert the right. *Griffin v. Dunn*, 79 Ark. 408, 96 S.W. 190 (1906).

Fraud.

This section does not apply to a suit to set aside a judicial sale on the ground of fraud. *Phelps v. Jackson*, 31 Ark. 272 (1876).

A suit to set aside for fraud a probate sale of land is a suit for the recovery of land sold at judicial sale within this section. *Hindman v. O'Connor*, 54 Ark. 627, 16 S.W. 1052 (1891).

This section was applicable in a case which involved only constructive fraud.

Bland v. Fleeman, 58 Ark. 84, 23 S.W. 4 (1893).

Having failed to prove fraud, the plaintiffs were barred by this statute of limitations from a recovery. *Salinger v. Black*, 68 Ark. 449, 60 S.W. 229 (1900).

Judicial Sales.

This section has no application to sales under execution as they are not judicial sales. *Hershby v. Latham*, 42 Ark. 305 (1883).

This statute of limitations is not applicable to unconfirmed judicial sales. *Lumpkins v. Johnson*, 61 Ark. 80, 32 S.W. 65 (1895); *Morrow v. James*, 69 Ark. 539, 64 S.W. 269 (1901).

Tax sale is not a judicial sale within this section. *Worthen v. Fletcher*, 71 Ark. 386, 42 S.W. 900 (1897).

An heir who holds under deed executed by commissioner in chancery appointed to partition lands of an estate is not a purchaser under judicial sale. *Rowland v. McGuire*, 67 Ark. 320, 55 S.W. 16 (1900).

Foreclosure sales are judicial sales. *Holloway v. Eagle*, 135 Ark. 206, 205 S.W. 113 (1918).

Persons Subject to Statute.

This statute makes no exception in favor of married women. *McGaughey v. Brown*, 46 Ark. 25 (1885).

This statute of limitations does not run against one in possession. *Phillips v. Jones*, 79 Ark. 100, 95 S.W. 164 (1906).

This section does not run against persons who were not parties nor bound by the suit in which the sale was made. *Gaither v. W.A. Gage & Co.*, 82 Ark. 51, 100 S.W. 80 (1907).

A minor is barred at the expiration of the statutory period after his majority from attacking sale by his guardian. *Cunningham v. Dellmon*, 151 Ark. 409, 237 S.W. 450 (1922).

Suit by mortgagor to recover realty is barred by the statute of limitations where the action is not brought within statutory period from the date of sale. *Moorehead v. Niven*, 222 Ark. 116, 257 S.W.2d 361 (1953).

Recovery of Land.

An action to remove a cloud upon the title of land sold at a tax sale is not for the recovery of land within this section. *Streett v. Reynolds*, 63 Ark. 1, 38 S.W. 150 (1896).

An action to have lands formerly belonging to an estate decreed to be held in trust for heirs and creditors was for the recovery of land within this section. *Salinger v. Black*, 68 Ark. 449, 60 S.W. 229 (1900).

A suit to enforce dower rights was not for recovery of land within this section. *Fourche River Lumber Co. v. Walker*, 96 Ark. 540, 132 S.W. 451 (1910).

Redemption of Property.

Plea of limitations not available to attorney to whom some cotenants had mortgaged land to secure fee, since his purchase at tax sale of all land was in effect a redemption for the benefit of all cotenants. *Kitchens v. Wheeler*, 200 Ark. 671, 141 S.W.2d 34 (1940).

Action by former owner who redeemed land from the sale for writ of assistance to obtain possession from purchasers was not subject to this statute of limitations as to judicial sales. *Lincoln Nat'l Life Ins. Co. v. Smith*, 205 Ark. 1023, 172 S.W.2d 241 (1943).

Running of Statute.

The statute of limitations does not begin to run against judicial sales, until five years from the date of the confirmation. *Johnson v. Taylor*, 140 Ark. 100, 215 S.W. 162 (1919).

Action held not barred. *Douglas v. Ferris*, 197 Ark. 32, 122 S.W.2d 558 (1938); *Davidson v. Sanders*, 235 Ark. 161, 357 S.W.2d 510 (1962).

Action held barred. *Rouse v. Teeter*, 214 Ark. 488, 216 S.W.2d 869 (1948); *Taylor v. Goodwin*, 237 Ark. 121, 371 S.W.2d 617 (1963).

Void Sales.

A judicial sale of homestead lands during the minority of the deceased's children being void, the statute of limitations does not run against another child of the deceased. *Martin v. Conner*, 115 Ark. 359, 171 S.W. 125 (1914).

Statute does not apply to void sale by improvement district. *Dupree v. Williams*, 172 Ark. 979, 291 S.W. 84 (1927).

This section does not apply to a void sale under foreclosure of improvement district lien. *Rouse v. Teeter*, 214 Ark. 488, 216 S.W.2d 869 (1948).

Cited: *Gynn v. McCauley*, 32 Ark. 97 (1877).

18-61-106. Recovery of lands held under tax title.

(a) No action for the recovery of any lands or for the possession thereof against any person or persons, their heirs and assigns, who may hold such lands by virtue of a purchase thereof at a sale by the collector, or the Commissioner of State Lands, for the nonpayment of taxes, or who may have purchased the lands from the state by virtue of any act providing for the sale of lands forfeited to the state for the nonpayment of taxes, or who may hold the land under a donation deed from the state, shall be maintained, unless it appears that the plaintiff, his or her ancestors, predecessors, or grantors, was seized or possessed of the lands in question within two (2) years next before the commencement of the suit or action.

(b) This section shall not apply to lands which have been sold to any improvement district of any kind or character for taxes due such districts, nor to any taxes due any such improvement districts, but the lien of said taxes shall continue until paid.

History. Acts 1857, § 1, p. 80; C. & M. Dig., § 6947; Acts 1937, No. 7, § 1; Pope's Dig., § 8925; Acts 1945, No. 82, § 2; A.S.A. 1947, § 34-1419.

Publisher's Notes. Acts 1857, § 1, p. 80, as amended, is also codified as § 18-60-212(a) and (b).

Cross References. Recovery of lands

held under tax title, § 18-60-212.

CASE NOTES

ANALYSIS

Constitutionality.
Construction.
Applicability.
Actions for Recovery of Land.
Donation Deeds or Certificates.
Improvement Districts.
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Pleading.
Possession.
—Adverse Possession.
Redemption.
Running of Statute.
—Donation.
Validity of Deed or Sale.
—Color of Title.
—Void Deed or Sale.

Constitutionality.

Subsection (a) is valid. *Ross v. Royal*, 77 Ark. 324, 91 S.W. 178 (1905).

Construction.

This section must be strictly construed. *McMillen v. East Ark. Inv. Co.*, 196 Ark. 367, 117 S.W.2d 724 (1938).

Applicability.

This section only applies to an action for the recovery of possession, not to a suit to foreclose a mortgage. *Wright v. Walker*, 30 Ark. 44 (1875); *Gates v. Kelsey*, 57 Ark. 523, 22 S.W. 162 (1893); *City of Helena v. Hornor*, 58 Ark. 151, 23 S.W. 966 (1893); *Willingham v. Jordan*, 75 Ark. 266, 87 S.W. 424 (1905); *Carpenter v. Smith*, 76 Ark. 447, 88 S.W. 976 (1905); *Dickinson v. Hardie*, 79 Ark. 364, 96 S.W. 355 (1906); *Bradbury v. Dumond*, 80 Ark. 82, 96 S.W. 390 (1906); *Gannon v. Moore*, 83 Ark. 196, 104 S.W. 139 (1907); *Tatum v. Arkansas Lumber Co.*, 103 Ark. 251, 146 S.W. 135 (1912); *Terry v. Drainage Dist. No. 6, Miller County*, 206 Ark. 940, 178 S.W.2d 857 (1943).

This section has no application to a case where public lands have been sold for taxes, and they have been afterward entered. *Gaither v. Lawson*, 31 Ark. 279 (1876).

This section does not apply to a suit to enjoin the execution of a tax deed. *Hare v. Carnall*, 39 Ark. 196 (1882).

This section applies to infants and others under disability. *Sims v. Camby*, 53 Ark. 418, 14 S.W. 623 (1890); *Sparks v. Farris*, 71 Ark. 117, 71 S.W. 255 (1903).

This section did not apply in a case where the widow who was joint tenant with minor children in homestead suffered a forfeiture for nonpayment of taxes as a device to destroy the interests of the minor children. *Rowland v. Wadly*, 71 Ark. 273, 72 S.W. 994 (1903).

This section does not apply to a sale of land belonging to the state. *Brinneman v. Scholem*, 95 Ark. 65, 128 S.W. 584 (1910).

This section has no application where the alleged purchaser has no color of title. *Sutton v. Lee*, 181 Ark. 914, 28 S.W.2d 697 (1930).

This section was not applicable in favor of defendant who purchased land sold for taxes under erroneous double assessment and who had title to and possession for statutory period of adjacent tract under deed from taxpayer's father. *Morgan v. Austin*, 206 Ark. 235, 174 S.W.2d 562 (1943).

Actions for Recovery of Land.

Suit to recover on notes for balance on purchase price of land, to have a lien declared and to foreclose, was held not an action for the recovery of land within this section. *Rural Realty Co. v. Buckner*, 203 Ark. 474, 158 S.W.2d 17 (1942).

Donation Deeds or Certificates.

Holder of donation certificate who occupied land adversely for more than statutory period acquired good title notwithstanding the fact that drainage district was holder of record title. *Honeycutt v. Sherrill*, 207 Ark. 206, 179 S.W.2d 693 (1944).

Improvement Districts.

This section does not afford relief against suit to foreclose prior drainage district tax liens. *Miller v. Cache River Drainage Dist.*, 205 Ark. 618, 170 S.W.2d 371 (1943).

Payment of Taxes.

Possessor's failure to pay subsequent taxes does not operate to deprive him of

the benefit of this section nor to question validity of subsequent tax sale. *Schuman v. Kerby*, 203 Ark. 653, 158 S.W.2d 35 (1942); *Sage Land & Lumber Co. v. Hickey*, 222 Ark. 147, 257 S.W.2d 941 (1953).

A widow, having what is similar to a life estate in the homestead, has the duty to pay the taxes, and cannot remain in possession and acquire a tax title adverse to the remainderman. *Vesper v. Woolsey*, 231 Ark. 782, 332 S.W.2d 602 (1960).

Pleading.

An allegation in a complaint that the defendant has been in lawful possession of the land for statutory period is not an admission that the possession was adverse or under claim of ownership under a tax deed and therefore does not show affirmatively that the plaintiff's right of action is barred. *Berg v. Johnson*, 139 Ark. 243, 213 S.W. 393 (1919).

Nonpossessory suit in equity to cancel alleged void tax sale and donation certificate could not, after decree granting the relief prayed, be converted into an action in ejectment by thereafter filing a motion for a writ of assistance and still be maintained in equity, thus depriving defendant of all rights to have compensation for his improvements made. *Patterson v. McKay*, 202 Ark. 241, 150 S.W.2d 196 (1941).

Possession.

Actual possession of the plaintiff, his ancestors, predecessors, or grantors under a deed is contemplated. *Harvey v. Douglass*, 73 Ark. 221, 83 S.W. 946 (1904); *Towson v. Denson*, 74 Ark. 302, 86 S.W. 661 (1905).

Under this section, actual possession of land taken and held continuously for statutory period under a tax deed bars an action for recovery though the sale is irregular or void for jurisdictional defects. *Maywood v. Mayo*, 153 Ark. 620, 241 S.W. 7 (1922).

Continuous possession for the statutory period is necessary to sustain title under this section. *Pride v. Gist*, 169 Ark. 1096, 277 S.W. 870 (1925).

Actual possession during the statutory period of time must be continuous and unbroken. *McMillen v. East Ark. Inv. Co.*, 196 Ark. 367, 117 S.W.2d 724 (1938).

Where complaint to set aside tax deed was not filed until more than two years

after date of deed and grantee had held possession of the lot for longer than statutory period under his tax deed, the deed would not be set aside. *Bridwell v. Davis*, 206 Ark. 445, 175 S.W.2d 992 (1943).

Actual possession of land under deed from the state for over four years before former owner intervened in suit to confirm state title alleging invalidity of tax sale to the state vested a good title as against any claim of ownership by former owner. *Standard Sec. Co. v. Republic Mining & Mfg. Co.*, 207 Ark. 335, 180 S.W.2d 575 (1944).

Where minerals were constructively severed from the soil by mineral deeds and were non-producing, it follows that there was no possession of the minerals by anyone within the purview of this section. *Davis v. Stonecipher*, 218 Ark. 962, 239 S.W.2d 756 (1951).

In action to quiet title by purchaser at tax sale wherein defendant counterclaimed for cancellation of tax deed, this statute of limitations could have only been invoked by one in actual possession of the land. *Alsobrook v. Taylor*, 254 Ark. 132, 491 S.W.2d 808 (1973).

—Adverse Possession.

Adverse possession for statutory period by tax purchaser bars original owner. *Cooper v. Lee*, 59 Ark. 460, 27 S.W. 970 (1894); *Woolfork v. Buckner*, 60 Ark. 163, 29 S.W. 372 (1895); *Finley v. Hogan*, 60 Ark. 499, 30 S.W. 1045 (1895).

Adverse possession for statutory period by tax purchaser bars original owner, unless there is a right to redeem. *McConnell v. Swepston*, 66 Ark. 141, 49 S.W. 566 (1899).

A purchaser at a void tax sale who goes into possession and remains in undisturbed possession for longer than the statutory period acquires title by adverse possession. *Black v. Brown*, 129 Ark. 270, 195 S.W. 673 (1917).

Actual adverse possession of land taken and held continuously for statutory period under a donation deed bars an action for recovery, even though sale by a collector, through which the state claims title, is void on account of jurisdictional defects. *Terry v. Drainage Dist. No. 6, Miller County*, 206 Ark. 940, 178 S.W.2d 857 (1943).

This section is a statute of limitations and actual adverse possession under a tax deed from the Commissioner of State

Lands vests a good title in the occupying holder of the donation certificate or deed, regardless of any defects in the tax sale under which the state acquired title. *Honeycutt v. Sherrill*, 207 Ark. 206, 179 S.W.2d 693 (1944).

After purchaser held land adversely under donation for two years, his title became good by limitation and would not be divested out of him because he attempted to purchase from the holder of the record title. *Honeycutt v. Sherrill*, 207 Ark. 206, 179 S.W.2d 693 (1944).

Where state's deed to mortgagor's son was in effect a redemption by mortgagor, possession of land by son was not adverse under this section. *Lewis v. Fidelity Sav. & Trust Co.*, 207 Ark. 433, 181 S.W.2d 22 (1944).

Title by adverse possession acquired. *St. Louis Union Trust Co. v. Hillis*, 207 Ark. 811, 182 S.W.2d 882 (1944).

The fact that purchaser and his grantor, who took possession of land under the deed from the state of Arkansas, held exclusive possession of lands and exercised visible and notorious acts of ownership over same, for longer than the statutory period prior to the filing of an action by the plaintiff, was sufficient to give the purchaser title. *Pitts v. Johnson*, 212 Ark. 119, 205 S.W.2d 449 (1947).

One who took title under a void tax sale, and claimed adverse possession for more than the statutory period, was entitled to only the land which he had actually possessed. *Nall v. Phillips*, 213 Ark. 92, 210 S.W.2d 806 (1948).

Intent to hold land adversely was not disclaimed where plaintiffs made offer to buy out defendant, if offer stated that plaintiffs were claiming title under tax deed, and were merely offering what it would take to clear title. *Cook v. Langhorne*, 219 Ark. 443, 242 S.W.2d 838 (1951).

Tax title purchaser could not assert adverse possession as a result of the original owner's tenant having attorned to the tax title purchaser after tax sale in absence of proof that original owner had notice that tenant had attorned to such purchaser or was put on notice that the statute of limitations was running. *Laney v. Monsanto Chem. Co.*, 233 Ark. 645, 348 S.W.2d 826 (1961).

Where testimony showed no plaintiff had ever been in possession of land in

question, this section applied and one holding under a state deed adversely for the statutory time had vested title regardless of a defect in the tax sale. *Brown v. Masterson*, 240 Ark. 880, 402 S.W.2d 666 (1966).

Where the record contained no evidence of notice of any kind to the heirs or their predecessor in title, the defendant's claim to title which rested wholly on a showing of adverse possession following possession by permission would fail. *McDowell v. King*, 266 Ark. 1005, 589 S.W.2d 594 (Ct. App. 1979).

This section, in essence, shortens the period of limitation for the recovery of lands adversely possessed under deeds based on tax sales to two years, and two years actual adverse possession by the holder of the tax deed is required before the original owner's right to recover the land is barred. *Boyd v. Meador*, 10 Ark. App. 5, 660 S.W.2d 943 (1983).

Redemption.

Plea of limitations was not available to attorney to whom some cotenants had mortgaged land to secure fee, since his purchase at tax sale of all land was in effect a redemption for the benefit of all co-tenants. *Kitchens v. Wheeler*, 200 Ark. 671, 141 S.W.2d 34 (1940).

Conveyance of title based upon tax sale to administratrix of the person who owned the lot at the time of the sale operated as a redemption from the sale, the tax title merged into the legal title and her grantees had no tax title which could enable them to claim under the provisions of this section against heirs of the taxpayer. *Hofstatter v. Bona*, 205 Ark. 729, 170 S.W.2d 1016 (1943).

The fact that this section has no saving clause in favor of infants does not preclude a minor from bringing an action to redeem a homestead from forfeiture after the limitations period as the action is saved by §§ 16-56-116 and 26-37-305. *Kendrick v. Bowden*, 211 Ark. 196, 199 S.W.2d 740 (1947).

Since the tax title acquired by a widow amounted to a redemption, the statute of limitations on tax sales had no application, nor could a claim of adverse possession for the statutory period be anchored on the tax title. *Vesper v. Woolsey*, 231 Ark. 782, 332 S.W.2d 602 (1960).

Running of Statute.

The statute of limitations begins to run from the expiration of the period allowed for redemption, not from the date of sale. *Cairo & F.R.R. v. Parks*, 32 Ark. 131 (1877).

Actual possession under deed sets the statute of limitations in motion. *Woolfolk v. Buckner*, 67 Ark. 411, 55 S.W. 168 (1900); *Hixon v. Fulks*, 210 Ark. 204, 194 S.W.2d 870 (1946).

Time is reckoned from date of deed. *Wade v. Goza*, 78 Ark. 7, 96 S.W. 388 (1906); *Hixon v. Fulks*, 210 Ark. 204, 194 S.W.2d 870 (1946).

Statute of limitations held not to bar action to recover land. *Hurst v. Munson*, 152 Ark. 313, 238 S.W. 42 (1922).

Possession by virtue of a purchase at a void tax sale must have been extended or enlarged after the date of the collector's deed before this statute of limitations will begin to run. *Sanderson v. Thomas*, 192 Ark. 302, 90 S.W.2d 965 (1936).

Action held barred by statute of limitations. *Chavis v. Henry*, 205 Ark. 163, 168 S.W.2d 610 (1943); *Bridwell v. Davis*, 206 Ark. 445, 175 S.W.2d 992 (1943); *Baum v. Yarberry*, 212 Ark. 471, 206 S.W.2d 190 (1947).

This section is a statute of limitations, and begins to run, not from the date of sale, but from the date actual possession is taken under the deed. *Terry v. Drainage Dist. No. 6, Miller County*, 206 Ark. 940, 178 S.W.2d 857 (1943); *Sims v. Petree*, 206 Ark. 1023, 178 S.W.2d 1016 (1944); *Hoch v. Ratliff*, 216 Ark. 357, 226 S.W.2d 39 (1950).

In order for tax title purchaser to assert adverse possession as a result of original owner's tenant having attorned to tax title purchaser after tax sale, the true owner must be put on notice that the two year statute is running in favor of tax title grantee. *Laney v. Monsanto Chem. Co.*, 233 Ark. 645, 348 S.W.2d 826 (1961).

The only way the statute of limitations of this section will run against the owner of mineral rights is for the owner of the surface rights or some other person to take actual possession of the minerals by opening mines and operating them. *Walker v. Western Gas Co.*, 5 Ark. App. 226, 635 S.W.2d 1 (1982).

Period of limitation begins to run, not from the date of the tax deed, but from the date actual possession is taken under it.

Boyd v. Meador, 10 Ark. App. 5, 660 S.W.2d 943 (1983).

—Donation.

Possession under donation certificate does not set the statute of limitations in motion. *Hagerman v. Moon*, 68 Ark. 279, 57 S.W. 935 (1900); *Quertermous v. Walls*, 70 Ark. 326, 67 S.W. 1014 (1902).

The statute of limitations against an action to recover forfeited lands held under a donation deed does not begin to run until the possession of the defendants begins under the donation deed. *Dressler v. Carpenter*, 107 Ark. 353, 155 S.W. 108 (1913).

The statute of limitations begins to run from the defendant's holding under a donation deed, not from the date of the collector's sale of the land for nonpayment of taxes. *Hutton v. Pease*, 190 Ark. 815, 81 S.W.2d 21 (1935).

Validity of Deed or Sale.

A purchaser of land who has been in possession of the land under a tax deed for more than the statutory period acquires title, regardless of the validity of the tax sale. *Black v. Brown*, 129 Ark. 270, 195 S.W. 673 (1917); *Maywood v. Mayo*, 153 Ark. 620, 241 S.W. 7 (1922); *Pitts v. Johnson*, 212 Ark. 119, 205 S.W.2d 449 (1947); *Baum v. Yarberry*, 212 Ark. 471, 206 S.W.2d 190 (1947); *Hoch v. Ratliff*, 216 Ark. 357, 226 S.W.2d 39 (1950); *Dowd v. Elliott*, 220 Ark. 228, 247 S.W.2d 208 (1952).

This section is a statute of limitations, which when applicable concludes all inquiry into the validity of a tax sale where the property sold was sufficiently described. *Schuman v. Kerby*, 203 Ark. 653, 158 S.W.2d 35 (1942); *Hofstatter v. Bona*, 205 Ark. 729, 170 S.W.2d 1016 (1943).

Contest of validity of the tax sale is subject to the statute of limitations on action for recovery of land against purchaser at sale by the Commissioner of State Lands. *Jaedecke v. Rummell*, 207 Ark. 286, 180 S.W.2d 842 (1944).

Debtor who was in possession of the property at issue and who claimed an equitable interest in the property was entitled to challenge the quiet title action asserted by the subsequent purchaser, after that purchaser bought the property in a tax sale and sought to quiet title under § 18-60-601, because the debtor had al-

leged an equitable interest in the property and the debtor had not received notice of the tax sale. Debtor's claim was not barred by the statute of limitations set forth in § 18-61-106. *In re Paro*, 362 B.R. 419 (Bankr. E.D. Ark. 2007).

—Color of Title.

Void tax deed is not color of title. *Woodall v. Edwards*, 83 Ark. 334, 104 S.W. 128 (1907).

—Void Deed or Sale.

One who takes possession of a part of a tract of unoccupied land under a tax deed conveying the entire tract acquired title to the entire tract by limitation after the lapse of the statutory period even though the sale under which the deed was made was void. *Earl v. Harris*, 121 Ark. 621, 182 S.W. 273 (1915).

The statute of limitations applicable to possession under a tax deed applies to any tax deed which sufficiently describes the land occupied and purports to convey the same, even though the deed is void on its face. *Champion v. Williams*, 165 Ark. 328, 264 S.W. 972 (1924).

Where tax sale was void because notice did not contain sufficient description, but deed of the Commissioner of State Lands correctly described a portion of the land sold under the void description and there was possession under the donation certificate and deed of more than the statutory period, the donee was protected by this section. *Wilson v. Triplett*, 204 Ark. 902, 165 S.W.2d 943 (1942).

Tax deed covering sale of mineral interests in certain described land was void where mineral interests in assessment book were indexed alphabetically instead of by land description. *Davis v. Stonecipher*, 218 Ark. 962, 239 S.W.2d 756 (1951).

This section is applicable to possession under a tax deed which sufficiently describes the land even though such deed is void for other reasons. *Sage Land & Lumber Co. v. Hickey*, 222 Ark. 147, 257 S.W.2d 941 (1953).

The section runs against void sales as well as voidable or regular sales. *Sage Land & Lumber Co. v. Hickey*, 222 Ark. 147, 257 S.W.2d 941 (1953).

Deeds to land by the state, though based on void sales, constitute color of title, and actual possession under color of title will bar the owner from maintaining a suit for its recovery unless the suit was brought within statutory time limit. *Brandon v. Parker*, 124 Ark. 379, 187 S.W. 312 (1916).

A tax deed void for insufficient description is not such color of title as will set in motion the statute of limitations. *Halliburton v. Brinkley*, 135 Ark. 592, 204 S.W. 213 (1918); *Kennedy v. Burns*, 140 Ark. 367, 215 S.W. 618 (1919); *Goodrich v. Darr*, 161 Ark. 514, 256 S.W. 868 (1923); *Liggett v. Church of Nazarene*, 291 Ark. 298, 724 S.W.2d 170 (1987).

The invalidity of a tax sale does not prevent the tax deed from being color of title in order to apply the statute of limitations. *Skelly Oil Co. v. Johnson*, 209 Ark. 1107, 194 S.W.2d 425 (1946).

Cited: *McCann v. Smith*, 65 Ark. 305, 45 S.W. 1057 (1898); *Witherspoon v. Johnson*, 201 Ark. 100, 144 S.W.2d 39 (1940); *Townsend v. Bonner*, 205 Ark. 172, 169 S.W.2d 125 (1943); *Schuman v. Westbrook*, 207 Ark. 495, 181 S.W.2d 470 (1944); *Hensley v. Phillips*, 215 Ark. 543, 221 S.W.2d 412 (1949); *Beck v. DeFir*, 227 Ark. 112, 296 S.W.2d 396 (1956); *National Property Owners Ass'n v. Hogue*, 229 Ark. 743, 318 S.W.2d 151 (1958).

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Packet and navigation companies.

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Eminent domain.

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